APPENDIX A

Filed October 8, 1970

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RIVERTON COAL COMPANY, et al.,
Plaintiffs,

v.

Civil Action
No. 5805

UNITED MINE WORKERS OF AMERICA,
Defendant.

and

RIVERTON COAL COMPANY, et al.,
Plaintiffs,

v.

Civil Action
No. 6730

UNITED MINE WORKERS OF AMERICA,
Defendants.

Findings of Fact and Conclusions of Law

1. This is an action brought by plaintiffs Riverton Coal Company and Davison Fuel and Dock Company (called "Riverton" and "Davison") for damages against defendant United Mine Workers of America (Called "UMW") under Section 303 of the Labor Management Relations Act, 1947, as amended (29 USCA 187), charging UMW committed unfair labor practices under Section 8(b)(4)(i)(ii)(A) and (B) and Section 8(e) of the Act by unlawfully coercing Riverton by strike action into signing the National Bituminous Coal Wage Agreement of 1950, as amended effective April 2, 1964, and April 1, 1966,

respectively, containing the "Application of Contract to Coal Lands" clause and the 80-cent clause.

UMW denied (1) liability, (2) damages and (3) that plaintiff Davison falls within the scope of the term "Whoever" as found in Section 303 (b) of the Act so as to be entitled to a recovery for any alleged injury.

A jury was waived and the case was tried to the Court.

2. Riverton is a West Virginia corporation, qualified to do business in West Virginia, with its offices located at North Bend, Ohio. At all times material hereto, Riverton was engaged in the business of coal mining and loading river barges in West Virginia. Riverton operated coal mines on leased property in Kanawha County and Fayette County, West Virginia, and also operated coal loading docks on the Kanawha River at Crown Hill and at Marmet, West Virginia. Riverton sold a major portion of coal mined or otherwise acquired by it in West Virginia to customers located outside the State of West Virginia, and loaded river barges at Crown Hill and Marmet with coal transported in interstate commerce outside the State of West Virginia. Riverton was engaged in an industry affecting commerce among the several States.

3. Davison is an Ohio corporation qualified to do business in Ohio and West Virginia, with its offices located at North Bend, Ohio. The said Riverton was, at all times material, a wholly owned subsidiary of Davison. Davison and Riverton had common officers. The Davison family, of which Daniel Davison and Lewis Davison are members, owned the majority interest in the common stock of Davison Fuel and Dock Company. Davison owned land mined by Riverton and also owned the Marmet dock which it likewise leased to Riverton. Some of the non-signatory coal producers from which Riverton bought

coal at relevant times in this proceeding operated their mines on lands owned by Davison. Davison was exclusive sales agent for Riverton's coal, receiving commissions of from 6% to 8% of the sales price of all coal sold by Davison for Riverton. Davison was an affiliate of Riverton. Davison is engaged in an industry affecting commerce among the several States.

4. Davison acted as record keeper for Riverton. During said period, Davison owned some coal land but produced no coal and participated in no collective bargaining negotiations with UMW and executed no UMW contracts.

5. Riverton owned no coal property but operated mining properties and produced coal at three mines in Kanawha and Fayette Counties, West Virginia, on land leased by Riverton from third parties. Some of Riverton's leased properties were owned by Davison.

6. The defendant UMW is an unincorporated association and a labor organization, with headquarters in Washington, D.C., and a district office in Charleston, West Virginia. At all times material hereto, it was serving as exclusive bargaining representative of certain employees of Riverton employed by Riverton to work in the said coal mines and docks of Riverton located in the State of West Virginia. For the purposes of this litigation only, it is admitted that at all relevant times in its relations with the plaintiffs, District 17 was acting as agent for the defendant UMW. R. R. Humphreys was President and Secretary-Treasurer of District 17 and was on the International payroll of the defendant UMW. His duties included the supervision and instruction of field workers in their duties. Emery McCoy was field representative of District 17. His duties included servicing local unions at the di-

rection of the said District President. Charles Neal, now deceased, was Vice President of District 17 and worked under the direct supervision of the said District President. R. O. Lewis preceded the said R. R. Humphreys as President of District 17.

7. Defendant UMW, an unincorporated association is a "labor organization" within the meaning of the Labor Management Relations Act, 1947. During the past 20 years approximately 75 to 82 percent of all production in the bituminous coal industry has been produced by UMW members as employees of unionized employers and during that same approximate period there has not been a nationwide strike of its members, authorized or wildcat.

8. The said employees of Riverton belonged to Local 1209, a duly chartered local, and subordinate branch of the defendant Union. As of January 1, 1964, Davison had no UMW employees in West Virginia; its ten employees at the North Bend, Ohio, plant were represented by District 50, with whom it had entered into a collective bargaining agreement.

9. At all times Riverton had sufficient coal reserves on the property which it leased as lessee to satisfy all orders and calls from customers—this was true quantity-wise and also grade- or quality-wise. It did not increase its production to fill its orders and calls because Riverton "could not financially put in any more coal mines." Riverton's projected costs would have exceeded what it cost to acquire added coal through contracts with small operators, some union and some not, and some operating under subleases on land controlled by Riverton. But for the financial limitations, Riverton's coal reserves were sufficient to produce all coal necessary to fill all of River-

ton's and/or Davison's requirements to supply all its customers or contractees.

10. Riverton did not mine all the coal it needed or that Davison needed to fulfill its contracts and it was customary "to buy supplemental coal" from various producers, some operating on Riverton's lands. Riverton had first refusal on coal produced by them. Riverton also bought coal from other producers operating on lands other than Riverton's. All coal so purchased, of varying qualities and grades, except for lump coal was commingled. Most purchased coal was produced by companies not signatory to the UMW contract. There is no evidence that the "supplemental" coal purchased was purchased because Riverton-produced coal did not meet the type or quality demands of its customers. The only supplementing was in quantity. Prior to January, 1964, Davison purchased coal from its wholly-owned Fields Creek Mining Co., which ceased production when its No. 3 mine worked out.

11. During the period July, 1963, through March, 1964, Riverton purchased a total of 322,250.72 tons of non-signatory coal as compared with 87,400.16 tons acquired from signatory producers and of this amount of about 409,000 tons, some 273,000 tons was produced by operators working lands leased or owned by Riverton or Davison.

12. Collective bargaining in the bituminous coal industry has long followed a multiemployer pattern. In 1941, the Appalachian operators split into northern and southern groups and signed separate agreements with UMW. Despite this split among the operators, a uniform national agreement was negotiated for the industry in 1945. Since 1942, UMW's agreements have been on a

uniform, industry-wide basis (which was true as to the 1964 and 1966 Agreements) with the exception of captive mines which use their own coal and do not purchase other coal.

13. The division of operators into northern and southern groups persists to this day. The Bituminous Coal Operators Association (BCOA), formed in early 1951, represented northern operators and Southern Coal Producers Association (SCPA) represented the southern operators, in dealing with UMW. From 1942 through 1966, UMW contracts were negotiated with coal operator associations, individual companies and individual operators. Since 1950, collective bargaining negotiations in the industry have generally been conducted under the following pattern: UMW first negotiates an agreement with representatives of BCOA. Terms of the BCOA agreement are then presented to SCPA, the midwest operators associations and individual operators.

14. Riverton is and has been a member of Kanawha Coal Operators Association (KCOA), which has handled and continues to handle Riverton's grievances with UMW under the application of the National Agreement. KCOA, in turn, is and has been a member of SCPA. SCPA became a member of BCOA in 1968. Riverton did not authorize KCOA either to negotiate for or to execute either the 1964 or 1966 Agreements, which Riverton itself executed. The 1958 Agreement was executed by SCPA on behalf of Riverton. By letter of February 28, 1966, KCOA notified District 17's president that it was authorized by Riverton to represent it in the application of the National Agreement. "Application" is to be distinguished from "negotiating" or "agreeing to." Riverton did not authorize anyone, KCOA or SCPA or BCOA,

to either bargain or negotiate, or agree for it in either 1964 or 1966. It was not, in either year, a member of any "multiemployer" bargaining group.

In each of the UMW collective bargaining negotiations since 1950, UMW has hammered out a collective agreement with one or more multiemployer groups (such as BCOA or SCPA) and then presented the agreed result to other smaller multiemployer groups and individual operators. The result has consistently been an industry-wide contract (generally leaving room for negotiation and agreement over local matters not inconsistent with the provisions of the basic contract). The result since 1950 (in at least each of 1950, 1952, 1958, 1964, 1966) has been the same as though the industry on one side and the Union on the other had actually engaged in industry-wide bargaining—and this was true to a considerable extent for some years before 1950. As a practical matter (historically) one unit at the bargaining table has been all the UMW members, industry-wise, and not at that time but as a sort of practical nunc pro tunc all the industry employers, except the captive operators. The non-represented (at the basic bargaining) employers have been, in today's parlance, the "dominoes."

15. Bituminous coal markets had contracted severely in the years immediately prior to 1958. In the 1945-64 period, coal production declined from a high of 630 million tons in 1947 to a low of 391 million tons in 1954. Thereafter, a partial recovery to 500 million tons in 1956 preceded a rapid decline to 410 million tons in 1958. This long-term market decline was accompanied by an enormous investment by the industry in machinery designed to increase efficiency in the mines and to preserve coal's competitive position vis-a-vis other fuels. Where-

as in 1948 the percent of bituminous coal in the distribution of mineral fuels was 40.1, as compared with 35.1 percent for petroleum products and 16.6 percent for natural gas, this had so changed by 1963 that the comparative percentages for that year were 21.6 for coal, 40.7 for petroleum products, and 33.2 for natural gas. Together, loss of markets and mechanization had a heavy impact on the number of jobs in the industry. In 1948, almost 411,000 men were employed in the mines. Ten years later that figure had shrunk to less than 174,000 and the trend was continuing strongly downward, so that in 1963 production workers in the industry numbered less than 121,000. For a further background see Mr. Justice Goldberg's opinion in Mineworkers v. Pennington, 381 U.S. 657, at 672 and 697, 65 LRRM 2369 et seq.

16. Within the industry, the 1948-63 period saw great changes in consumption patterns. The railroad market, once a principal outlet for bituminous coal, disappeared; the retail market was reduced by 60 percent; while, on the other hand, electric utilities more than doubled their purchases to become, as a class, coal's largest single customer.

17. In 1945, the capacity of bituminous coal operators to produce coal was 620 million tons, the idle capacity was 42 million tons, thus making the percentage capacity utilized 93.2 percent. In 1947, the capacity was 755 million tons, the idle capacity 124 million tons, and the percentage of capacity utilized 83.6 percent. In 1954, the capacity was 603 million tons, the idle capacity 211 million tons, and the percentage of capacity utilized was 65 percent. In 1958, the capacity was 625 million tons, the idle capacity 215 million tons, while the percentage of capacity utilized was 65.7 percent. 196[illegible] capacity of 627 million tons carried an idle capacity [illegible] million

tons, so that the percentage of capacity utilized was 73.2 percent.

18. Coal producers were able to produce far more coal than the country could consume, up until the last six months and that was true for years prior to either 1958 or 1964.

19. The utility and steel industries are among the largest and most stable purchasers of bituminous coal. It is customary for companies in these industries to cover a high percentage of their needs through long-term contracts. Producers entering into these contracts often need to supplement their own production in order to meet delivery schedules.

20. Certain consumers require a particular grade, quality, size or mix of coals. No single producer may be able to supply the precise type of coal specified, thus necessitating a subcontract. The purchasing of coal by one producer from another is an essential marketing practice in the bituminous coal industry.

21. Prior to the effective date of the 1958 amendment to the National Bituminous Coal Wage Agreement, the legitimate commercial practices described in the preceding paragraphs had given rise to certain abuses. These abuses arose from the fact that coal produced in mines having substandard labor conditions can usually be purchased at prices below the cost of production in unionized mines. This results not only from the lower wages paid in substandard mines but also from the absence of contributions to any welfare fund, the lax observance of safety requirements and the generally lowered standards of working conditions and fringe benefits prevailing in these mines. Before December the 1st, 1958, some producers who were signatories to the

National Bituminous Coal Wage Agreement regularly purchased coal from substandard mines solely because of the cost differential. This occurred even though in many instances the purchasing producer had ample producing capacity available to satisfy his customers' requirements, and there were employees on layoff who were deprived of the employment opportunities which would have been available had their employer elected to produce all of the coal to be delivered to this customer rather than to purchase some from a substandard supplier.

22. UMW's Exhibits 16-20 demonstrate that wages paid in signatory mines are materially greater than those paid by operators in non-signatory operations.

23. It was customary for Riverton to buy supplemental coal in order to fulfill its contracts with buyers of coal. This coal was customarily commingled with coal mined by Riverton and was then washed and lump coal was screened out. In 1962 and 1963, the plaintiff Davison sold 2,170,000 tons of coal, of which 967,354 tons, or 44½%, was coal which had been acquired by Davison and Riverton from third persons not owned or controlled by Davison or Riverton or any affiliate thereof. A substantial part of that 44½% was produced from lands owned or leased by Riverton or Davison. Coal acquired by Riverton was purchased from mines signatory to an agreement with defendant Union and also from mines not signatory to an agreement with defendant Union. During the nine calendar months before April 1964, 78% of the coal purchased by Riverton came from non-signatory mines and 22% came from signatory mines. The base price of purchased coal was the same for signatory and non-signatory suppliers.

24. UMW has long sought to preserve work opportunities for its employee members by negotiating contractural restrictions upon the "contracting out" of work. The Appalachian Joint Wage Agreement (1941) reserved the right to strike "to preserve and maintain the integrity and competitive parity of this Agreement"; the Kanawha District Agreement of that year provided, "The practice of subcontracting and the hiring of back hands for the mining and loading of coal shall not be permitted"; a 1943 directive order of the National War Labor Board directed that each agreement contain a provision relating to leased mines that "Operators agree that they will not let any operating mines subject to this Agreement as a subterfuge" to avoid the Agreement's provisions; an identical clause was contained in the National Bituminous Coal Wage Agreement of 1945; and the 1952 Amendments to the National Agreement of 1950 read thus: "As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said Operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement." The subcontracting provisions of the 1952 Agreement were carried forward in the 1958 Agreement. The 1964 and 1966 Agreements provided:

> "As part of the consideration for this agreement, the Operators signatory hereto agree that this agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any

> of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production or use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."

25. The so-called "subcontracting" and "to what land does this contract apply" clauses (including the Protective Work Clause in the 1958 agreement—see infra) were bargained for by UMW in a sincere effort to stop the employers' practice—which was prevalent—of avoiding the burdens (to the employer) of a union contract by the legalistic subterfuge of "leasing" or "dummying." The contractual provisions up to 1964 did not do much good; the purpose of maintaining "unit work" for the employee "unit" or "units" (whether one considers the units as industry, multiemployer, or individual) was not accomplished. The purpose and intent of the Union in negotiating these clauses, including the Protective Work Clause of 1958, was primary and not secondary. "Substitute coal" in this area means coal a producer could readily produce himself but chooses to buy from others. "Supplemental" coal in this area means coal a given producer cannot produce himself, either from a quantity problem or a quality problem. What is substitute and what is supplemental is not a black and white area—it is decidedly "grey." In this case, for example, (a) when plaintiff's Fields Creek mine (231,000 tons produced in 1963) ran out in 1963 it was promptly replaced by a new mine, or greater production, so that Riverton's 1964 production exceeded Riverton and Field Creek in 1963; (b) when the 80 cent constraint caused Riverton to cease

buying from non-union operators, Riverton increased its own overall production so that the total tonnage handled by the plaintiffs in 1964 and 1965 compared favorably (a little less) with what was handled in 1963 and 1962. This record does not explain why financial ability to expand production (1964-65) was missing in 1962-63. The point is, that with the difficulties in differentiating between supplemental and substitute, and the employees' unquestioned primary interest in "substitute," the conglomerate became a legitimate primary target.

26. The 1958 Agreement contained the so-called Protective Work Clause (PWC) which provided:

> ". . . the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract."

A further provision of the clause provided:

> ". . . any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms."

PWC was included in the contract hammered out in Washington on December 3, 1958, by the BCOA and the UMW, was signed by SCPA on December 4 and by most other non-captive mine operators in the industry by January 1, 1959 (including Riverton). The "hammered" out contract became industry-wide (for union employers) involving some 80% of total production.

27. The "United Mine Workers of America Welfare and Retirement Fund of 1950" was created under the provisions of Section 302(c)(5) of the Labor Management Relations Act, 1947. Beneficiaries under the said Welfare and Retirement Fund Plan were by its terms limited to employees of signatories, their families and dependents. Only operators whose employees are represented for purposes of collective bargaining by and who are signatory to a collective bargaining agreement with the defendant Union make contributions to the said United Mine Workers of America Welfare and Retirement Fund of 1950.

28. Effective December 1, 1958, Riverton entered into a written collective bargaining agreement with the defendant, which, by its terms, was:

> "* * * effective as of December 1, 1958, and is not subject to termination by any party signatory hereto prior to November 30, 1959, PROVIDED HOWEVER, That either the parties of the first part or the party of the second part may terminate this Agreement on or after November 30, 1959, by giving at least sixty (60) days' written notice to the other party of such desired termination date."

The agreement of 1958 by its terms "amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the 'National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952,' the 'National Bituminous Coal Wage Agreement of 1950' and all previous Agreements as therein provided." Among the provisions of the National Bituminous Coal Wage Agreement of 1950 referred to and incorporated therein was a provision entitled "Settlement of Local and District Disputes" which provided as follows:

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

The said National Bituminous Coal Wage Agreement of 1950 as Amended September 29, 1952, provided on page 3 thereof:

> "3. The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse of the courts."

29. In August of 1963 a panel of the NLRB concluded that PWC violated 8(e) of the Act. (Lewis, et al, 144 NLRB 228, 54 LRRM 1037.) The so-called 80-cent clause involved in this case was the direct and inseparable result of an effort by the Union to devise a "legal" substitute and "collectively bargain" it through. The result was the inclusion of the 80-cent clause and "application to coal lands" clause in the contract. The provisions follow:

> **"UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950**
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> "Amend the first printed paragraph of subsection A of this clause by striking out all of the second sentence beginning with the word 'during' and ending after the word 'sale' and inserting in lieu thereof the following: 'During the life of this agreement there shall be paid into such Fund by each Operator signatory herete the sum of forty cents (40¢) per ton of two thousand (2,000)

pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition.'

"Amend the eleventh printed paragraph of subsection A by substituting a semicolon for the period at the end of the first sentence and adding the following: 'together with a monthly statement showing the full amount due hereunder on all bituminous coal procured or acquired from any mine, preparation plant or facility other than those owned or operated by such signatory Operator, all as hereinabove set out and provided.'

"Amend the second sentence of the thirteenth printed paragraph of subsection A by inserting a comma after the word 'mine' and then adding the following: 'preparation plant or other facility' and further amend the thirteenth paragraph by striking out the words 'obligation hereunder' at the end of the paragraph and substituting in lieu thereof the following: 'any of the obligations hereunder.'

APPLICATION OF CONTRACT TO COAL LANDS

"Amend the section denominated 'Application of Contract to Coal-Lands' by striking out the language of that section and inserting in lieu thereof the following:

> 'As part of the consideration for this agreement, the Operators signatory hereto agree that this Agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this Agreement or any section, paragraph or clause thereof.' "

The said amendment effective April 2, 1964,[1] also amended the "Termination of Agreement" provisions of the 1958 agreement by substituting the following language therefor:

> "This amended agreement dated March 23, 1964, shall be effective April 2, 1964, and is not subject to termination by any party signatory hereto prior to March 31, 1966, PROVIDED, HOWEVER, That either the parties of the first part or the party of the second part may terminate this Agreement on or after March 31, 1966, by giving at least sixty (60) days' written notice to the other party of such desired termination date."

30. Riverton became a signatory to the 1958 agreement voluntarily. The method was as a multiemployer "negotiator" or "fiat." The method was via SCPA which represented Riverton for negotiating and signing purposes.

31. On August 27, 1963, as noted above, the NLRB, by its Chairman and two members, found PWC in the 1958 Agreement to be within the ban of the Act's Section 8(e) [144 NLRB 228, 54 LRRM 1037]; and on December

[1] Being the date BCOA and UMW formalized and signed the agreement arrived at in late March.

12, 1963, the Board, acting upon a motion for reconsideration *en banc*, entered an order stating its inability to arrive at a majority decision. The 80-cent clause in the 1964 Agreement resulted from the NLRB holding that the protective wage agreement was violative of law and PWC was then substituted by the 80-cent clause. In an attempt to protect the work opportunity of UMW members by contractual provisions against subcontracting UMW sought to have the substitute clause in the contract providing for $1.00 payments into the Welfare Fund; the operators rejected the suggestion; and the negotiators of UMW and of the operators finally agreed on 80 cents a ton (the operators were, of course, the multiemployer representatives).

32. Prior to and at the time PWC was negotiated in 1958 and to and at the times the 80-cent clause was negotiated (at the multiemployer levels) in 1964 and 1966 "subcontracting" (a misnomer, really—more accurately it was leasing and subleasing and using various means to reap economic advantage for producers by [what tax lawyers would refer to as split-up or spin-off, or subsidiarizing[2]] loosening up coal lands and coal miners' work from union contracts) was a real and not fancied problem. The *primary* target of the union—intent—in bargaining out PWC was unquestionably subcontracting. The clause was directed at (1) job security, (2) welfare fund integrity. Whatever the unit, that was the real primary intent. Obviously, the parties [Union and employer(s)] recognized that it could and would also call for and result in additional unionization. That was a secondary result within contemplation at the time of bargaining —it was an incidental purpose and/or result. It is a fact.

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[2]This is, of course, "quasi"—since the subcontractees were not controlled by the operators.

and so found on this record, in the language of the District of Columbia Circuit that "the 80 cent clause is, by everyone's admission and our characterization, a substitute for the union standards clause (PWC)." (Union v. N.L.R.B., 399 F.2d 977 (1968), at 980, 68 LRRM 2664) It is found, therefore, that the primary purposes of the somewhat enforced *substitute* (80% clause) were the same as the original (PWC), i.e., to protect the jobs and work of signatory employees and maintain the integrity of the Welfare Fund.

33. The National Bituminous Coal Wage Agreement of 1950, as amended in 1958, by its terms was not subject to termination prior to November 30, 1959, and thereafter was subject to termination by a party thereto by such party giving at least sixty (60) days written notice to the other of its desire to terminate the agreement. Neither Riverton nor UMW has ever given to the other party to the Riverton-UMW 1958 contract a notice of termination and the 1958 contract was in full force and effect at all times up to April 15, 1964, to the full knowledge of UMW and its agent, District 17. BCOA and SCOA had waived the notice but Riverton had not and neither BCOA's or SCOA's or Kanawha Association's waiver in any wise affected Riverton. The union employees of Riverton did, in fact and law, have a binding contract extending to April 15, 1964, at least, i.e., the 1958 contract negotiated by the employees' bargaining agent.

34. During the fall of 1963 the UMW, through District 17, specifically called to the attention of plaintiff the fact that it was doing business with non-union operators operating under leases from plaintiff on lands controlled by plaintiff and the purpose was to secure plaintiff's "help" in organizing these operators in exchange for a

Union "consent" to a business enterprise plaintiff was interested in.

35. On or about April 2, 1964, Field Representative Emery McCoy warned Lewis Davison, President of Riverton, at the Crown Hill office of Riverton, that "there probably will be trouble" when Riverton's employees represented by the defendant Union found out that Riverton had not yet signed a new collective bargaining contract.

On the evening of Friday, April 19, 1964, Arby McCoy, Financial Secretary and Chairman of the mining committee of Local 1209, and Edward Perry, a member of the Union mining committee, both of whom were employees of Riverton, began stopping trucks entering the Riverton river tipple at Crown Hill. A work stoppage commenced and continued until the evening of April 15, 1964.

On April 13th, Lewis Davison went to the District headquarters of the defendant Union in Charleston and asked District President Humphreys for a copy of the 1964 proposal which the defendant Union wanted Riverton to sign. Humphreys handed Davison a printed document entitled "National Bituminous Coal Wage Agreement of 1950 as Amended effective April 2, 1964." Davison asked Humphreys, "Well, what is it going to take to get the men back to work?" Humphreys answered, "Sign the contract." Davison declined to sign until Riverton's attorneys had approved the document.

On April 13, 1964, Riverton wired W. A. Boyle, President of the defendant Union, and Raymond Humphreys, stating:

"TO SETTLE THIS ILLEGAL STRIKE WE ARE WILLING TO SIGN THIS AGREEMENT AND PUT THE WAGE INCREASE INTO

EFFECT IF YOU WILL ELIMINATE TWO SECTIONS ENTITLED 'UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950' AND 'APPLICATION OF CONTRACT TO COAL LANDS.' WE ARE ADVISED THAT THESE TWO CLAUSES ARE ILLEGAL. ARE YOU WILLING TO OMIT THEM OR SUGGEST MODIFICATIONS WHICH WILL BE LEGAL? WE ARE WILLING TO CONTINUE THE WELFARE AND RETIREMENT FUND PROVISIONS OF OUR CURRENT CONTRACT WITH YOUR UNION FOR THE DURATION OF THE NEW AGREEMENT PAYING 40¢ PER TON INTO THE FUND AS IN THE PAST ON EACH TON OF BITUMINOUS COAL PRODUCED BY US FOR USE OR SALE."

On the following day, R. O. Lewis, Vice President of the defendant Union, telegraphed Riverton from Washington, D.C., stating:

"REURTEL CONCERNING ILLEGAL STRIKE AT RIVERTON. YOU ARE ADVISED THAT YOUR COMPANY WAS SIGNNATORY TO 1958 AGREEMENT BY VIRTUE OF KANAWHA OPERATORS ASSOCIATION SIGNATURE. THE ASSOCIATION HAS NOW EXECUTED A NEW AGREEMENT THEREBY VOIDING THE EARLIER AGREEMENT AND YOUR COMPANY HAS REFUSED TO PERMIT THE ASSOCIATION TO SIGN FOR YOU. THE UNION IS NOT INVOLVED IN THE STOPPAGE. IT IS A VOLUNTARY PROTEST OF YOUR EMPLOYEES AGAINST YOUR FAILURE TO EXECUTE THE NEW AGREEMENT. WITH REFERENCE YOUR REMARKS ON APPLICATION OF CONTRACT TO COAL LANDS AND THE WELFARE FUND SECTION OUR ATTORNEYS EXPRESS THE OPINION THAT THESE SECTIONS ARE LEGAL AND WE DO NOT ANTICIPATE CHANGING THE AGREEMENT ON THE BASIS THAT YOUR ATTORNEYS ARE TRYING TO USURP THE PEROGATIVES OF THE PROPERLY CONSTITUTED COURTS OF THIS COUNTRY. MAY WE EXPRESS THE HOPE THAT YOUR COMPANY WILL JOIN THE GREAT MAJORITY OF THE COAL COMPANIES OF THIS COUNTRY IN BECOMING SIGNATORY TO THE 1964 AGREEMENT."

36. On April 15th, following receipt of the said telegram from R. O. Lewis, Riverton notified the defendant Union that in order to end the strike, it would sign the contract and asked the Union to send Emery McCoy out to Crown Hill with copies of the printed form. About 1:30 P.M. on that day, Emery McCoy and several members of the Local Mine Committee came to the plaintiffs'

office at Crown Hill and presented the printed contract forms to Lewis Davison for his signature. Davison signed the printed document entitled "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 2, 1964," stating that he was doing so "under protest, under coercion because of illegal strike," whereupon McCoy turned to the local committee and said, "Get the men back to work on the evening shift." The employees then promptly returned to work.

37. The defendant and its agents of District 17, including the Field Representative Emery McCoy, had knowledge on and before April 10, 1964, that members employed by Riverton believed their collective bargaining agreement was about to terminate and that members might not work without a contract, i.e., the officials knew that the men working in the mines, on learning of the end of the BCOA-UMW negotiations in March, 1964, and the contract formalization in early April, concluded that ended all existing contracts and made "scabs" of them if they worked for any operator who had not, one way or another, signed the newly negotiated contract. These agents also knew that the Riverton contract had not been terminated, that no termination notice had been given by either party, and that the contract would remain in full force and effect for at least sixty days after such a notice was given. With full knowledge of the men's belief they took no steps to advise the members that the contract had not been terminated and would continue to remain in full force and effect. Instead, Field Rep. McCoy authorized by District 17 and defendant to handle the Riverton matter and the Union's "man" in charge on the spot, threatened "trouble" if Riverton did not sign the new printed form of agreement. When Riverton employees in effect asked agent Emery McCoy if Riverton

and UMW still had a contract, he "told them that they didn't have one." For many years, as McCoy knew, the defendant Union has had a tradition of "no contract, no work." The defendant Union made no effort to "maintain the integrity" of the existing contract by referring the "differences" and "local trouble" to the "Settlement of Local and District Disputes" provisions of the 1950 agreement as required by that agreement and subsequent amendments. As an ultimate finding of fact, the action of the District representatives, in its context, was the equivalent of a "signal" to "strike" and was so intended by the District Representatives and the men. The Union instructed its members to strike, not by direct viva voce but in "union lingo"—as well understood by all concerned as is the Blackwood referred to now, by some, as "Back-woods" convention by a bridge player.

38. While it is true that after the strike the defendant's agents took no steps to end the strike until Riverton signed up (in that connection this Court, on a credibility basis, rejects entirely the testimony of the McCoys—their testimony was not only "less than candid" [a phrase used before in this overall controversy by an NLRB examiner] but in fact was obviously impelled by what each thought he *ought* to say—not coached, of course, but as a matter of self-initiation), took no disciplinary measures against any Union local officer or member for participation in an "unauthorized" strike, took no affirmative step at all to end it, this Court attaches no weight to such. In Mine Workers v. Gibbs, 383 U.S. 715, (1965) at 739, 61 LRRM 2561, the Court said:

> "There can be no rigid requirement that a union disavow such unlawful acts as may previously have occurred."

Also that part of Coronado, 259 U.S. 344 (1921), 268 U.S. 295 (1925), which survived subsequent statutory enactments leads this Court to conclude that UMW cannot be held responsible under any theory of passivity. Something affirmative is required before a conclusion of "union authorization" is justified. We find that requirement in the "integrity" provision of the 1958 agreement and in the quasi-affirmative expression of District 17 on April 10, 1964, that there was no contract between Riverton and the Riverton workers. There was.

39. An object of the April, 1964, strike at Riverton was to force or require Riverton to enter into the proposed 1964 printed form amendment to the National Bituminous Coal Wage Agreement of 1950. Another object of the said strike was to force or require Riverton and Davison to cease using, selling, handling, transporting or otherwise dealing in the products of coal producers who were not signatories to an agreement with the defendant Union and to cease doing business with such producers. Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers even though the defendant Union had not been certified as the representative of such employees under the provisions of Section 9 of the Act. After Riverton signed the 80-cent clause, and as a result thereof, some fifteen non-union producers from which Riverton had been buying supplemental coal became signatories to the UMW agreement. Some twenty-two did not—so the effect was not to "force" or "compel" but to encourage. Such "encouragement" was not a primary object of the strike—it was a recognized incident. The design or purpose or object remained—job protection.

40. Following the execution by Riverton of the 1964 amendment to the agreement with the defendant on April 15, 1964, Riverton bought no more coal from non-signatory suppliers. This was because, under the new agreement, the terms of the agreement were applicable to all suppliers of Riverton or Davison and a Welfare Fund payment of 80 cents a ton was required to be paid on all coal bought from non-signatories. Thereafter, Riverton was unable to make up its loss of volume of coal by purchase from other sources. Supplemental coal could not be acquired within a range of economic delivery at a price which Riverton could pay and realize a profit.

41. The 1964 Agreement was to continue in effect until March 31, 1966, and was subject to termination on or after the date by either party giving sixty days notice thereof in writing. UMW did not give Riverton a notice of termination of the agreement. During the term of the said 1964 agreement, Riverton was shut down again by a strike which began on April 12, 1966. In order to end the strike, Riverton was asked to sign and on or about April 27, 1966, agreed to sign a new printed form agreement entitled "National Bituminous Coal Wage Agreement of 1950 as Amended Effective April 1, 1966." The strike ended as soon as the plaintiff, Riverton, agreed to sign the new form agreement. The printed form agreement was subsequently executed by plaintiff, Riverton, on May 3, 1966, but prior to execution the defendant Union was informed in writing that the provision of the printed form entitled "United Mine Workers of America Welfare and Retirement Fund of 1950" was unlawful and that Riverton was signing "under protest."

The said document entitled "National Bituminous Coal

Wage Agreement of 1950 as Amended Effective April 1, 1966" carried forward and preserved the terms and conditions of the said previous agreements, including the 40-80 cent welfare clauses, and this addition thereto:

> "As part of the consideration for this agreement, the Operators signatory hereto agree that this agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production of use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal preparation facilities for the purpose of avoiding the application of this agreement or any section, paragraph or clause thereof."

At the multiemployer-Union level the 1966 negotiations were not concerned with the 80-cent clause. The bargaining concerned other subjects, e.g., increased wages, etc.—the duration of the negotiations at the multi-level and not any 40-80 cent clause caused the sporadic and wildcat strikes in general in April of 1966.

42. The Riverton employees ceased work on April 12, 1966, and returned to work on April 27, 1966. The immediate cause of the work stoppage was a picket line established at Riverton and elsewhere by dissident members of UMW Local Union 8843. The indirect cause of the unrest which affected not only Riverton but other area mines as well, was dissatisfaction with the progress of bargaining negotiations then going on between BCOA and the Union. Neither the work stoppage nor the wage negotiations then under way or which thereafter occurred in 1966 was concerned with the 80-cent clause or the Land

Lease clause; they were concerned with other economic factors. UMW did not, nor did District 17 or any of its agents, authorize or ratify the work stoppages at Riverton or elsewhere, nor did either authorize or ratify the picket lines of Local Union 8843. As of April 11, 1966, there were several area mines involved in the work stoppage and UMW's International Officers directed District 17, by telegram, to instruct the men to return to work pending the outcome of the negotiations. District 17 thus advised the groups of men involved. The District informed the members of Locals 8843 and 1209 of the international's telegram and called upon them to return to work. The men refused to return in spite of those efforts. While this situation prevailed, UMW succeeded in reaching an agreement with BCOA. Most area mines, including Riverton, made known their intention to sign the agreement and thereupon the Riverton men resumed work. As in 1964, Riverton signed the wage agreement individually, and although the so-called "80-cent" clause based on the claimed illegality thereof. The defendant took no affirmative action, other than above described, to end the strike, but, as noted above, it did not ratify by such inaction—nor did it encourage as in the case of the strike at Riverton in 1964.

As the Bureau of Labor Statistics, United States Department of Labor, reports in its Bulletin No. 1558 dealing with wage chronology in the bituminous coal mines, 1933-68, recites:

> "On April 11, 1966, in the absence of agreement on the union's proposals, about half of the industry's mines were closed by a walkout, and remained closed until an agreement reached on April 24 was ratified by the workers and signed by the parties on April 27. The parties to the earlier

settlement at mines in the midwest rescinded that agreement on April 27 and on the same date signed an agreement identical to that negotiated by the Bituminous Coal Operators' Association."

43. The object of the 1966 strike was not related to the 40-80 cent clause. At Riverton and elsewhere it was to force a conclusion, favorable to the Union, of the multi-employer negotiations which were not concerned with the 80-cent clause or the Coal Lands clause.

44. Riverton did not after execution of the 1966 amendment purchase coal produced by operators who had not signed the current UMW agreement.

45. Under UMW's Constitution, local union officers are elected by secret ballot of local union members and local union officers are paid from dues allocated to a local union pursuant to UMW's Constitution. Regular local union meetings are scheduled pursuant to bylaws of locals unions; and special meetings are called either by the local union's president or members thereof who request the calling of such special meeting.

Article XVI of the UMW Constitution provides that "No District shall be permitted to engage in a strike involving all or a major portion of its members, without the sanction of an International Convention or the International Executive Board." There is no evidence in this record that either the 1964 or 1966 strike in District 17 involved any such majority. Clearly the 1964 strike did not and the indications are the one in 1966 did not either. In 1951, 1956 and again on September 23, 1966, UMW's Executive Board advised its membership of its policy against unauthorized work stoppages, declaring in the September, 1966, advice "hereafter when it is proven that any member or members were engaging in promoting,

conducting or prolonging an unauthorized work stoppage, such member shall be penalized the sum of five dollars for each day of such unauthorized stoppage" in addition to any penalty imposed upon the local union involved..

The District took no steps to penalize Riverton's striking employees. To invoke a penalty against a member, charges must first be filed against him within his local union; he has a right of notice of the charges and he has a right to appeal his conviction. District 17's president had personal knowledge of both the 1964 and 1966 unauthorized strikes at Riverton and could have filed charges. Each of the contracts (1958 and 1964) was in effect a no-strike contract. See Lewis v. Benedict, 259 F.2d 346, 43 LRRM 2237 (6th, 1958), aff'd. (equally divided court) 361 U.S. 459, 45 LRRM 2719, and Teamsters Local v. Lucas Flour, 369 U.S. 95, 49 LRRM 2717 (1962). Since

a) as indicated above, this Court attaches no significance to any union inaction: and

b) this is not a 301 case

this finding No. 45 had no effect on the decision of this Court.

46. After plaintiff had executed the 1958 agreement with UMW containing the PWC, under which plaintiff agreed not to buy coal from operators whose employees worked under terms less favorable than UMW members, and specifically in 1959, 1960 and 1961, while that contract was in effect, plaintiff did in fact buy substantial amounts of coal from 32 operators (some union and some non-union) whose workers did in fact work under less favorable conditions. Of the 32—some of whom did not sell to plaintiff on a regular basis—14 operated on

land controlled by plaintiff (4 of the 14 on a purely oral lease). There is no evidence that plaintiff knew that the 32 were operating under substandard (from a point of view of union standards) conditions (which they were in fact), nor that the defendant knew that the union operators included in the 32 were.

The plaintiff became involved in a Walsh-Healey proceeding as a result of furnishing coal which had been acquired from the 32 operators on a Government contract (see 16 WH Cases 767 (1964)) which was eventually affirmed by a Federal Circuit Court. The record in that case does establish that the plaintiff, as an individual employer, was doing substantial leasing (or subcontracting if one would so describe it) and that the leasing bore some relationship with sub-union-standard wages and working conditions. For the wage part of it see, in addition to the W.H. report, Pennington, 381 U.S., at 660 and 671. This Court does not regard the knowledge or lack of knowledge of the activities of the 32 operators by either party to this case as of any import. The import of the Walsh-Healey record in this case is that it demonstrates that elimination of leasing was a legitimate bargaining target for the union in its 1958 and 1964 contracts with the plaintiff as an industrial employer, both from a union standards point of view and a protection of jobs point of view. There is no question but that, at all times of import to this case, plaintiff controlled sufficient coal properties which, if worked by plaintiff, would have resulted in supplying all coal desired by all of plaintiff's customers.

47. During 1962-63, Riverton's purchases of coal from third persons averaged 40,000 tons a month. In March, 1964, the last month before the 80-cent clause became

effective, Riverton's purchases were 41,568 tons. In the first month after the 80-cent clause became effective, purchases were 26,119 tons. During the remainder of the calendar year 1964, they averaged 24,930 tons a month. In the calendar year 1965, tonnage purchased averaged less than 23,000 tons a month. In 1966, the average was 21,194 tons and in 1967 was 26,800 tons. The reduction in purchases of supplemental coal by Riverton after April, 1964, were a consequence of the coal lands clause and the 80-cent penalty provision included in the 1964 agreement which Riverton signed as a result of the strike action of April 10-15, and in the 1966 agreement.

48. Before January 1, 1964, purchased coal was loaded and shipped through both the Crown Hill dock, operated by Riverton, and the Marmet dock, operated by Davison. After January 1, 1964, almost all purchased coal was shipped through the Marmet dock, then operated by Riverton. Cincinnati Gas & Electric Company is referred to as a "low realization customer." Others are referred to as "high realization customers."

The percentage of coal shipped by Riverton to high realization customers through the Marmet dock during the years in question was as follows:

April 10 to December 31, 1964	82.75%
January 1 through December 31, 1965	83.36%
January 1 through August 31, 1966	90.01%
September 1 through December 31, 1966	95.22%
January 1 through December 31, 1967	93.94%
January 1 through September 30, 1968	98.58%

The plaintiffs received a substantially higher realization per ton on coal sold to high realization customers than on coal sold to low realization customers.

49. All deliveries of coal to Riverton, and consequently by Riverton to its customers, declined in the spring of 1964 following execution of the 1964 amendment.

50. The 1964 and 1966 agreements of Riverton with the defendant Union were entered into by Riverton with the knowledge and acquiescence of Davison. By their terms they made Riverton responsible for the payment of an 80-cent per ton penalty to the United Mine Workers fund on all coal purchased by Davison from non-signatories. On January 30, 1964, Davison entered into a written agreement with Ford Coal Company, under which Davison agreed to buy 1,000 tons a day of strip and auger coal between 12,800 b.t.u. and 13,000 b.t.u. for a price of $3.85 a ton. The agreement was to extend for a period of two years.

51. After entering into the 1964 amendment to the National Bituminous Coal Wage Agreement, Davison notified Ford that it could and would not purchase its coal unless Ford became a union operator. Ford refused, whereupon plaintiff breached its contract and refused to buy. The breach and refusal were caused by the 80-cent clause in the 1964 contract. In May, 1964, Ford sued Davison in the Circuit Court of Kanawha County, West Virginia, alleging a breach of contract and damages of $850,000. On June 23, 1964, the suit was compromised for $15,000. As a further part of the settlement, Davison agreed to sell, as Ford's agent, up to 20,000 tons a month of Ford's production for a 7% commission. This agreement was for a two-year period. This was practically the same amount Davison had agreed to purchase under its January 30, 1964, contract. Such coal was to be delivered to Ford's dock at Coalburg, West Virginia. The contract (sales agency) did provide that Ford was to be free to

sell its coal elsewhere if it could get a higher price than Davison agreed to sales-agent it for. The sales-agency price was $4.29 a ton (about $3.99 net of commission) vs. the January contract purchase price of $3.85 a ton.

Prior to execution of the 1964 wage agreement Ford, though projected to furnish 1,000 tons per day, furnished Davison, and Davison purchased the following tonnage:

January, 1964	5875 tons
February	4165 tons
March	9743 tons
April	3746 tons

After execution of the June 23, 1964, sales agreement, under which Davison was exclusive sales agent for Ford's first 21,000 tons per month, Davison sold the following tonnages of Ford's coal:

July, 1964	7335 tons
August	13032 tons
September	9272 tons
October	3698 tons
November	937 tons

The only Ford tonnage sold thereafter by Davison was 919 tons in October, 1965, and some tonnage in 1966.

Under the sale agency agreement between Ford and Davison signed June 23, 1964, effective July 1, 1964, through June 30, 1966, Ford and Davison substituted a new mutual obligation to deal with one another on coal mined by Ford in substantially the same quality and quantity as provided in their January 30, 1964, purchase and sales agreement. There is no explanation in evidence why Ford did not sell through Davison the stipulated tonnage under the sales agency agreement after November, 1964. The reasons why Ford thereafter offered Davison virtually no coal to sell were not brought out

by plaintiff, but none of the possible reasons—lack of production, low quality coal, Ford's disregard of the sales agency agreement—can be attributed to the UMW. While the plaintiff has shown that it cancelled the Ford contract because of the constraint involved in the 80-cent clause, it has failed to show, by a preponderance of the evidence, that the constraint actually resulted in a deprivation to it of coal tonnage. Ritchie v. UMW, 410 F.2d 827, 71 LRRM 2212 (6th, 1969), infra, directs that the plaintiff in this type of case has the burden of proving a direct and proximate casual relationship by a preponderance. Under ordinary circumstances a court should and would rely on the presumption that a party who contracts, such as Ford, had the ability to perform—and that presumption, by itself, could furnish the foundation on which preponderance would rest. However, the evidence affirmatively shows in this case that Ford did not or could not perform its contract during the first quarter of the January 1964 purchase and sales Agreement—it either could not or did not perform it by more than 50% of its obligation. While there is a hint that higher coal prices, which Ford may have been able to get after the sales agency agreement was signed, furnished the reason; nonetheless in this record there is no evidence that Ford did or could have gotten higher prices. There is no evidence except that Ford, under a binding sale-purchase contract, could not live up to it for a three-months period, plus evidence that Ford did not subsequently, under the sales agency contract, furnish tonnage in any amount approaching the original contract amount even though the price under the sales agency contract to Ford was more advantageous than the price under the cancelled sales-purchase agreement. If Ford actually had been producing 20,000 tons a month and selling it after the date

of the sales agency agreement, such could easily have been established. Under the evidence in this record, this Court would simply be guessing on whether Ford would or could have produced any more tonnage than it turned over to plaintiff under the sales agency agreement. There is no evidence at all in this record about Ford's performance vis-a-vis 1000 tons a day after the sales agreement was entered into. There is some evidence that Ford's coal was not much count and it was not contradicted. "A fortiori" this Court may not assume or find that the contract of sale and purchase would be renewed for another two-year period after its original term. That is sheer speculation on this record which is demonstrated rather glaringly by a comparison of Ex. 9 (the companies Riverton was buying from in 1963) and Ex. B (paragraph 5). The tenure of a supplier to Riverton was rather brief. Also, one should note that the inclusion of the Ford 20,000 a month in the basis for loss of profit damage would involve a determination that the plaintiff, which had dealt in 483,000 tons of purchased coal a year in preconstraint years, would have purchased 800,000 tons in 1965—a year in which its own production had increased almost 200,000 tons over 1964. In the period 1959 to 1967, inclusive, the plaintiff(s) sales amounted, in round figures, to about a total of 1,000,000, tons a year, give or take 10% or so. For examples—

1960	1,094,000
1964	1,053,000
1965	1,141,000

This Court would simply be guessing were it to conclude that a company which sold 1,131,424 tons (produced and purchased) in 1963 (the last preconstraint year) would have produced, purchased and sold 1,600,000 in

1965, the first full constraint year. Conclusorily, the Ford item is excluded from any loss of profit consideration.

52. As a part of the 1964 Ford suit and settlement, Davison's attorney fees and expenses amount to $1,793.46. This damage of $1,793.46 to the plaintiff was proximately caused by the 80-cent clause in the 1964 agreement. And it was within the contemplation of the parties. See the 1958 agreement in which "existing agreements" were specifically excepted — indicating such matters were usually contemplated. No such exception was contained in the 1964 agreement.

53. Following execution of the April 1964 agreement, plaintiff Riverton initiated unfair labor practice charges against the defendant Union with the National Labor Relations Board, alleging that the said 80-cent clause violated Sections 8(b)(4) and 8(e) of the Act. This case is still pending before the Board following remand by the United States Court of Appeals for the District of Columbia subsequent to an original Board decision in Riverton's favor in the proceeding. Prosecution of the case entailed substantial expense and attorneys' fees paid by Riverton in the amount of $20,294.97 as of March 1968. This damage to plaintiff proximately resulted from the 80-cent clause and was reasonably forseeable. The point is made that only expenses related to the filing of the charge should be included. We disagree. Plaintiff had a right to appear by counsel in the proceedings before the NLRB and appeal therefrom—in addition, it was by the Board's invitation. The reasonableness of the need for counsel is for the client's determination[3]—and, as the

[3]Subject to a Court "overcall" only for rather clear unreasonableness. History (see No. 3 in Conclusions, infra) testifies to the unreasonableness in this instance.

defense of this case indicates, that often results in the representation by more than one lawyer.

54. During the strike of April 10-15, 1964, plaintiff Riverton incurred unavoidable continuing fixed costs and expenses in the amount of $13,095.57. During the strike of April 12-27, 1966, plaintiff Riverton incurred unavoidable continuing fixed costs and expenses in the amount of $36,128.50.

55. Plaintiff historically purchased about 40,000 tons a month (1962-63). In the period March 31, 1964, to March 31, 1966, inclusive, the repetition of history would have resulted in the purchase of (24 x 40,000) or 960,000 tons. Plaintiff actually purchased 538,000 tons (an approximate figure). The deficiency for the period is therefore 422,000 tons.

56. On the same historical basis, purchases for the period April, 1966, to and through September 30, 1968, would have been (30 x 40,000) or 1,200,000 tons. The actual purchases were 640,000 tons, a deficiency of 560, tons.

57. The plaintiff has shown, by a preponderance, that during the period April, 1962, through 1968, it was unable to fill orders on hand to approximately 800,000 tons—of which approximately 360,000 tons is applicable to the period April 1, 1964, to April 1, 1966, and the balance of 440,000 tons is applicable to the period April 1, 1966, to September 30, 1968.

58. The defendant claims that in order to maintain a loss of profit claim on coal it was unable to buy because of the 80-cent clause the plaintiff must show that there were non-signatory producers in the vicinity. The plaintiff directed no evidence as such at that. However, this

record shows (1) that there remained a substantial number of operators with which plaintiff did business before April 15, 1964, who did not become signatory and were eliminated as suppliers for that reason (i.e., the 80-cent clause reason) and (2) at all times from 1959 to April, 1964, the plaintiff was able to purchase very substantial amounts of coal from non-signatories. There is no reason not to apply the presumption of continuance and this Court, based thereon, finds that the plaintiff could have purchased from non-signatory operators the difference between what it usually brought (historically—1962 and 1963) and what it did buy in the period April 1, 1964, to September 30, 1968. It is therefore found that as a proximate result of the 80-cent restraint the plaintiff did not (but could have) buy from non-signatory operators—

In the period 4/1/64 - 4/ 1/66 — 422,000 tons
In the period 4/1/66 - 9/31/68 — 560,000 tons

and

that during the same periods the plaintiff could have sold at some profit—

Period 4/1/64 - 4/ 1/66 — 360,000 tons
Period 4/1/66 - 9/31/68 — 440,000 tons

The loss of profit on the tonnage which could have been sold—

First period — 360,000 tons
Second period — 440,000 tons

is an allowable item of damage under the "reasonable certainty" requirement, if the defendant be liable as a matter of law. The profit loss was foreseeable. The loss for the first period was proximately caused by the coercion of the April strike and the penalty characteristics of the 80-cent clause. There was no relation between the

1966 strike and the 80-cent clause; however, the contract (1966) itself, insofar as the 80-cent provision is concerned, is and was the coercion which prevented plaintiff from purchasing coal from non-signatories.

59. The plaintiff, in its damage claim, makes certain contentions which the Court rejects as speculative. Among them are these:

a) That the plaintiff's sales would have increased in 1964-68 according to industry increase percentages.

b) That the coal involved would have been sold to "high realization" rather than "low realization" customers—this based on dock routings for the four months preceding the period.

c) That the plaintiff was rushed for business in addition to that dealt with in the "order shortage" exhibit.

d) That the cancellation (or reducing to a one-year) of a long-term contract with the Cincinnati Gas & Electric Company was due to the price rise feature connected with the 80-cent clause, rather than a ceiling imposed in the long-term contract escallation clause involving comparison with another supplier. Available witnesses could have set that speculation to rest (i.e., employees of the customer, C.G. & E.). They were not produced by the party having the burden—with the usual inference.

We have considered each of these and, obedient to Riverside v. UMW, 410 F.2d 267, 70 LRRM 3214 (6th, 1969) reject each—the evidence in respect of each leaves us to guess or speculate. We are not "reasonably certain" in any of the above respects.

60. In the last preconstraint year, the plaintiff produced and/or purchased on the one hand, and sold on the other hand approximately 1,125,000 tons. The oper-

ating profit (before taxes and nonoperating expenses) realized from the integrated Davison and subsidiaries operation was approximately $95,000.00. On a per ton basis this amounts to a gross operating profit of approximately 8 cents a ton. True it be that the operations in the three years, 1963-64-65, fluctuated rather violently up and down but "once the fact of damage has been shown, uncertainty as to their amount will not foreclose recovery." Flame Coal v. UMW, 303 F.2d 39, 50 LRRM 2272 (6th, 1962). On this basis we accept the 1963 figure as the best proof, closest in time, available. On this basis, if the plaintiff be substantively entitled under the law to recover damage for loss of profit (i.e., if the unfair practice be established) the plaintiff is entitled to recover for loss of profit as follows:

Period 4/1/64 - 4/ 1/66 — $28,800.00
Period 4/1/66 - 9/31/68 — $35,200.00

61. The plaintiff's profit-loss damage claims, totalling $2,587,315.00 are rejected except to the extent dealt with above. The claims are based on plaintiff's exhibits 52 and 53 and the testimony relative thereto. The claim broadly amounts to an assertion that an operation which in the sole preconstraint year (1963) in evidence made $95,000.00 (before taxes etc.) would have made a profit (before taxes etc.) of in excess of $500,000.00 a year over the approximate 4½-years of constraint. This was not a new company—it was long existent. We have mentioned some assumptions leading to the assertion—one more should be mentioned: The plaintiff's loss of profit claim is based on, among other assumptions, the assumption that over 2,000,000 tons of coal, involving dozens of entities and some eleven millions of dollars could and would have involved no increase in administrative expense. That is simply too speculative.

Conclusions of Law

1. The plaintiffs, Riverton and Davison, are employers within the meaning of 29 U.S.C. § 152 and 29 U.S.C. § 187. They are engaged in "commerce" and a business "affecting commerce" within the meaning of the Labor Management Relations Act. Davison is an "affiliate" of Riverton and as such is includible within the meaning of the word "whoever" in 29 U.S.C. § 187. Gilchrist v. United Mine Workers, 290 F.2d 36, 48 LRRM 2083 (6th Cir. 1961); and Wells v. Union, 303 F.2d 73, 50 LRRM 2198 (6th Cir. 1962) are ample authority for this. If employees of a contracting party and a related partnership having a contract with the related employer are "whoevers," then certainly a legal entity described in a contract between a union and a company for the purpose of fixing additional liability upon the employer-contracting party (dependent upon the activity of the related company) is party enough to assert in a proper case damage arising from or connected with the contract and 29 U.S.C. § 187 and Section (b) of 29 U.S.C. § 158.

Throughout the findings of fact, this Court has intentionally referred to the plaintiffs in the singular. While the two plaintiff entities are separate and separable for a great many legal purposes, for purposes of this case they constitute actually only one "whoever" and one person.

2. The defendant is a "labor organization" within the meanings of Section 2 and 5 of the Labor Management Relations Act.

3. The $64 question in this case is whether the 80-cent and coal lands clauses of the 1964-66 contracts violate 29 U.S.C. 158(e) of the Act. The books are full of cases either directly or indirectly attacking the problem.

References to some of them and a little history by reference to others of them and the simple adoption of these cases and their incorporation herein by reference will substantially shorten these conclusions. All the arguments pro and con are in the books and this Court could provide no new answer—every question has been answered both ways in one or the other of the authorities. The significant point to bear in mind constantly is that the 80-cent clause did not just appear out of a vacuum. It has been repeatedly described as a substitute for the Protecive Work Clause and in fact the many litigants have agreed rather consistently that if the first clause be valid, the second one is also. The District Circuit put it this way:

> "Since the 80-cent clause is by everyone's admission and our characterization a substitute for the union standards clause, it is the Board's responsibility to carefully consider whether, in fact, it functions as one. If it does * * * the 80-cent * * * clause would seem to be a valid provision."

The background of the Protective Work Clause, which came forth in 1958, has been recited so many times by now in one or another of the courts in this circuit that it is probably a fair subject for judicial notice. It is described in considerable detail in Lewis v. Pennington, 257 F.Supp. 815, 62 LRRM 2604 (E.D. Tenn., 1966) beginning at page 821 and ending at page 825. The description fairly summarizes the evidence in this case dealing with the subject. In that case, Judge Taylor referred to the 80-cent clause as "devoid of secondary pressures and does not fall within the targets at which 8(e) was aimed." The decision in that case was affirmed on grounds not of interest here [400 F.2d 806, 69 LRRM 2280 (1968)] and in the course of the opinion, Judge Peck had occasion to

briefly refer to the Protective Work Clause (beginning on page 814).

In Ramsey v. United Mine Workers, 265 F.Supp. 388, 64 LRRM 2493 (E.D. Tenn.) Judge Wilson likewise described the history of the collective bargaining in the bituminous coal industry from 1890 through 1958. In the course of that description, Judge Wilson remarked at page 408:

> "It does appear that following the negotiations of the National Bituminous Coal Wage Agreement of 1950, the Union had in fact, if not in theory, nothing but the national contract and its amendments to offer to any other bargaining unit."

In 1962 the General Counsel of the NLRB charged the Union and its officers and the multi-employer signatories to the 1958 agreement with unfair labor practices within the meaning of 8(e) and Section 2 (6 and 7) of the Act. The Protective Work Clause was the basis of the charge. The General Counsel either then or thereafter held and has continued to hold that there is nothing secondary at all about the "application to coal lands" clause. With that this Court certainly agrees. In that proceeding and in August, 1963, the Board, with one member of a panel of three dissenting, concluded that the clause was secondary and did violate 8(e). R. O. Lewis, et al., 144 NLRB 228, 54 LRRM 1037. Subsequently, and after the decision and order in that case, the Union filed a motion stating that in April, 1964, they had negotiated a substitute for the PWC—that substitute being the .80-cent clause—contending that the substitute did not violate 8(e) and requesting the Board to so determine and thereupon conclude that the Union was in compliance with the Board's original order. The plaintiff in this case intervened in that proceeding. In that proceeding the Board

held that the 80-cent clause, too, violated 8(e), again with one member dissenting. See R. O. Lewis, 148 NLRB 249, 56 LRRM 1471, 57 LRRM 1146, decided August, 1964.

Thereafter an appeal was taken in this proceeding to the District of Columbia Court of Appeals. That Court, in August of 1965, characterizing the PWC as a union standards clause, remanded the case to the NLRB for consideration of the effect of several intervening decisions by that Circuit. The Court indicated that a determinative question which should be decided was this:

> In this industry what was the work unit—the employees of each mine operator on the one hand, or on the other hand all employees covered by union contract?

This case is reported as Lewis v. N.L.R.B., 350 F.2d 801, 59 LRRM 2946. In its language, the N.L.R.B. accepted the remand and in turn remanded PWC to a trial examiner. Meanwhile the chief executive officer of the plaintiff in this case—or, for purposes of this case, one might just as well say the plaintiff in this case—had filed an unfair labor practice charge based on the 80-cent clause. The trial examiner in March of 1966 concluded, as had the Board previously, that the 80-cent clause violated 8(e). His decision was affirmed by the Board on the ground that the "claimed protection of work extends beyond the bargaining units." The Board's decision is reported in 165 NLRB 467, 65 LRRM 1324. This decision of the Board was announced on June 16, 1967, and we refer to the proceeding as the plaintiff charging proceeding. Less than two weeks later, and on June 20, 1967, the trial examiner to whom the Board remanded the matter which the Circuit had remanded to it—PWC—

announced his decision in case titled 5-CE-6. His conclusion was that the protective wage clause "bears more than an incidental relationship to protecting the work standards set in the basic agreement and that it operates to encourage, but not to compel, the unorganized segment of the industry to become signatory to the agreement." See W. A. Boyle, et al., 179 NLRB No. 80, 72 LRRM 1426, 1428. Thereafter, in the plaintiff charging case, an appeal was taken to the District Circuit. In July, 1968, the Circuit remanded that proceeding, too, back to the NLRB, with directions that the Board make a full inquiry into the intent of the parties making the 80-cent clause agreement and a full inquiry into its validity as a "surrogate" union standards clause. Union v. NLRB, 399 F.2d 977, 68 LRRM 2664.

Next, and almost finally, in November of 1969, the Board, with one member dissenting, affirmed the conclusions of the remand trial examiner in PWC [72 LRRM 1426]. The Board concluded that PWC was primary in that it was an attempt to "protecting unit work through the medium of a union standards clause." W. A. Boyle, et al., *supra*, p. 1429. And last, in July of this year it came to the attention of the District of Columbia Circuit Court of Appeals that almost two years had gone by since its remand of the 80-cent case—the plaintiff charging case. The Circuit Court recalled its mandate and remanded to the NLRB with directions "to complete its proceedings on remand and to render a decision by 12/1/70."

This history is fairly indicative of the closeness of the question involved here and, as we have said, all the pros and cons may be found in the referenced reports.[1]

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[1]In Pennington, 381 U.S. 676, at 708, 59 LRRM 2369, 2385, Mr. Justice Goldberg, in a separate opinion, in a footnote, and having in mind as the footnote indicates PWC, asided (since that was an anti-trust case), that PWC "bristles with potential unfair labor practices."

Before the Labor Board and the District of Columbia Circuit and in the trial of this case, the various parties have directed considerable evidence and briefing to such questions as: What is the appropriate "work unit?" Does work unit mean the same as bargaining unit? Should there be one rule or conclusion governing substitute coal and another rule or conclusion governing supplemental coal? Who has the burden of proof in developing whether or not all substitute coal, of whatever grade, could be produced by the employer members involved in whatever was the proper bargaining unit or work unit? While we do not underestimate the importance of such questions in different contexts, we do not think a decision upon them is necessary to this case. If this Court underestimates the importance of the questions in this case, it is of no loss to any reviewing or other court—all the pros and cons that can be said have been said in the citations above given. We could add none to an eight-year history which has still left up in the air a final decision on any one of them—a rather sad tribute to our administrative and judicial system.

One of the questions of law in this case before this Court was whether the history of the union negotiations going back dozens of years (multiple and singular) which led to PWC and/or the 80-cent clause is relevant. The conclusion of this Court is in the affirmative. It is for this reason: Any work preservation clause or any union standards clause will of necessity limit the right of an employer to deal with other employers or to handle their products. It is difficult to imagine such a clause which would not run afoul of 8(e). While Fiberboard v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964), did not involve 8(e), since it arose in 1959, we look to it for an example. Fiberboard is definite authority for the proposition that

a contractual limitation on an employer prohibiting him from subcontracting work previously done himself is primary. Obviously the clause prevented the employer, not from handling the products of some employers or dealing with some employers, but from refraining from handling in the particular field involved the products of all employers or dealing in the particular field with all employers. It had 100% secondary effect. Since 8(e) was added in 1959, the Supreme Court has had occasion to deal with 8(e) in the areas involved in this case in Woodworkers v. NLRB, 386 U.S. 612, 64 LRRM 2369 (1967). If we read that case correctly it stands for this: The five majority held that even though the clause involved runs literally afoul of 8(e), inquiry should be made into the real purpose of the clause—secondary or primary. If we read the four minority correctly, their holding was that whatever the purpose was, if a product boycott is a result, work preservation is no excuse. Before taking the liberty of paraphrasing part of the majority opinion in the context of this case, it should perhaps be reiterated that the entire history of the union negotiations with coal mine operators and the specific history of union negotiations with the plaintiff is relevant and competent in respect of the question of union purpose; that would be obviously so in respect of the plaintiff and under the facts in this case, as outlined above, and as contained in the opinions of the district courts in this Circuit above, no one can separate union intent or purpose in the multiple in 1964 or 1966 or 1958 from union intent or purpose in the singular.

And now to the paraphrasing—the clause which started Woodworkers in effect prohibited the employer from buying fitted doors. The clause with which we deal prohibited an employer from buying products produced

under less favorable labor conditions than were applicable to the employer. Union carpenters in Philadelphia had historically handled unfitted doors. Union miners had historically been confronted with the problem of subcontracting. Their problem had been historically not only subcontracting but in a sense the same problem the Internal Revenue Service has had for many years in dealing with spin-offs or split-ups—the problem being: who is really who. This is as good a place as any to note that 8(e) fundamentally deals with preventing one independent person from dealing with another independent person. "Any other employer" in 8(e) does not include an alter ego of the contracting employer and a change of name or activation of a corporation is no more sanctimonious in this field than in any other legal field. In the nine months' period prior to April 1, 1964, the plaintiff purchased—subcontracted, if one would use a more accurate word in this field—approximately 410,000 tons. In the entire year of 1963, approximately 617,000 tons were produced by the plaintiff and its subsidiaries. If we would extend the nine months' period proportionately, it would be concluded that the plaintiff during 1963 purchased or subcontracted for roughly about half the coal it dealt in and produced about half of it—43% to 57% is about accurate. In 1964, the production by the plaintiff amounted to almost 650,000 tons and, in 1965, the plaintiff's own production, 832,000 tons, was approximately 75% of the aggregate of coal produced and purchased in 1963. While the plaintiff pleads financial inability in 1963, there is no evidence in this record of any difficulty in plaintiff's financial ability 1963 vis-a-vis 1965. To get back to the nine months' period antedating the 80-cent clause, of the 409,000 tons purchased by the plaintiff in that period, two-thirds was purchased from

operators operating on land owned or leased by the plaintiff and about one-third was purchased from independent—to return to the statute: "any other employer." By everyone's admission, PWC was not enforced, so that was no problem to any employer; by everyone's admission, the 80-cent clause posed real problems to employers. The factual development after the effective date of the 80-cent clause is considerable indication of what could have been and was a real concern of the defendant union vis-a-vis the plaintiff at the time the 80-cent clause was "negotiated." And this record bears out that the same condition existed generally in the industry.

To return again to the paraphrasing: The Court majority indicated that the target conclusion of the Seventh Circuit was that "primary or secondary objective was irrelevant to a question whether a 'will not handle' agreement violates 8(e)." The Court said:

> "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'"

It said:

> "* * * congressional action to deal with such conduct has stopped short of proscribing identical activity having the object of pressuring the employer for agreements regulating relations between him and his own employees. * * * Congress meant * * * to prohibit only 'secondary' objectives * * * its [8(e)] core concept: union pressure directed at a neutral employer the object of which was to induce or coerce him to cease doing business with an employer with whom the union was engaged in a labor dispute. * * * however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective.

"The literal terms of § 8(b)(4)(A) also were not applied in * * * cases in which the union's pressure was aimed toward employers performing the work of the primary employer's striking employees. The rationale, again, was the inapplicability of the provision's central theme, the protection of neutrals against secondary pressure, where the secondary employer against whom the union's pressure is directed has entangled himself in the vortex of the primary dispute. '[T]he union was not extending its activity to a front remote from the immediate dispute but one intimately and indeed inextricably united to it.' * * *.

"* * * § 8(b)(4)(A) * * * barred as a secondary boycott union activity directed against neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere. * * * [Nothing in 8(b)(4)(B) makes unlawful, where not otherwise unlawful, any primary activity.] * * * Although the language of § 8(e) is sweeping it * * * does not prohibit agreements made and maintained for [the] purpose * * * to preserve for [employees] work traditionally done by them * * *".

"* * * primary work preservation agreements were not to be within the ban of § 8(e). * * * Congress, in enacting § 8(e), had no thought of prohibiting agreements directed to work preservation. * * * 'the termination of employment which * * * necessarily results from the contracting out of work performed by members of the established bargaining unit,' is 'a problem of vital concern' * * * 'Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework'. * * * these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions."

The nub of the decision is at pages 644 and following of the majority opinion.

> "The determination whether the 'will not handle' sentence of Rule 17 and its enforcement violated § 8(e) and § 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances,
>
> [Footnote: As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 et seq. (1964).]
>
> the Union's objective was preservation of work for * * * employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, * * * the boycotting employer * * * would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. This will not always be a simple test to apply. But 'however difficult the drawing of lines more nice than obvious, the statute compels the task.' * * *
>
> "That the 'will not handle' provision was not an

unfair labor practice in these cases is clear. The finding of the Trial Examiner, adopted by the Board, was that the objective of the sentence was preservation of work traditionally performed by the jobsite carpenters. This finding is supported by substantial evidence, and therefore the Union's making of the 'will not handle' agreement was not a violation of § 8(e).

"Similarly, the Union's maintenance of the provision was not a violation of § 8(b)(4)(B). The Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union. This and other substantial evidence supported the finding that the conduct of the Union on the * * * jobsite related solely to preservation of the traditional tasks of the jobsite carpenters."

There is one feature of the 80-cent clause which makes the "task" of "drawing lines more nice than obvious" particularly difficult. By everyone's concession, a clause in a union-employer contract which would prohibit the employer from doing business with any non-union employer would be an unfair labor practice and illegal. By everyone's admission also, no employer but a union signatory employer could, legally or otherwise, make contributions to the United Mine Workers Welfare Fund—so we were told partially by stipulation in this case and partially orally during the trial. From that it would appear that the inescapable conclusion is that the 80-cent clause prohibited an employer from doing business with a non-union employer. Two things in this record militate against that. The 80-cent clause is not an actual prohibition—it may or may not be a penalty amounting to a prohibition. It may or may not have been the negotiated estimate of a price that would assure the employee that

the employer would not substitute, but would only supplement. This record does indicate that there was negotiation between $1.00 and 80 cents at the multiemployer levels, but we are told nothing on this record of the factors involved in that negotiation. In the absence of a record of what happened, a court may only conjecture. If the 80-cent amount was negotiated out as the reasonable price of effective deterrents to substituting, it would not be invalid. The contract therefore being capable of several possible constructions in the absence of light of the actual negotiations, a court should construe it in the light which would sustain it. We so do. See Lewis v. Pennington, 400 F.2d 806 (6th Cir. 1968) at 814-15, 69 LRRM 2280; Ramsey v. UMW, 265 F.Supp. 388, 64 LRRM 2498 (E.D. Tenn. 1967). In the latter case, at page 412, Judge Wilson, dealing with a part of this same contract, observed—

> "The law is well settled that where two constructions of a written contract are reasonably possible, preference must be given to that one which does not result in a violation of law."

Another factor leading to this conclusion is, of course, that by everyone's admission the 80-cent clause is a substitute for PWC. PWC has been defined both by the NLRB and the District of Columbia Circuit as a "union standards clause." While PWC did contain a provision that one of the factors to be considered before the joint committee was "payments to the United Mine Workers Fund," it did not provide that the presence or absence of such was in and of itself determinative of "like standards." If anything, it was merely a factor. This Court so construes it, based on the Sixth Circuit Pennington case, supra. In the task of drawing fine lines, it should be no surprise to conclude that an admitted substitute is the

equivalent of what it was substituted for, particularly when the substitute was obviously enforced by an NLRB hearing in a decision which has subsequently been reversed by the same NLRB.

Conclusorily, it is the conclusion of law of this Court that neither PWC nor the 80-cent clause ran afoul of 8(e). The primary, and clearly primary, purpose of each of them was to tackle in a successful way a legitimate problem of subcontracting and work preservation which has existed for decades and had been attached for decades in unsuccessful contractual methods. It is difficult to separate secondary results from secondary purposes—using secondary in its common sense and not in its Labor Management sense. A secondary effect of each of these clauses was the protection of the Welfare Fund—clearly a legitimate primary (in a labor sense) target. A secondary effect of each of these clauses was the unionization of some non-union employers. It was foreseeable and in that sense was a purpose at the time the clauses were negotiated. However, using the terms in the Labor Management sense, the secondary purpose was an incident to the primary purpose, which was work preservation. It is obvious on the record that the unionization effect was a matter of choice, even to neutral employers. It was not a matter of compulsion. Of the neutral employers with which the plaintiff dealt in early 1964, 15 unionized and 22 did not. On this record, one could only conclude that the 80-cent clause did exactly what it was designed to do—it resulted in the employer producing more with his own employees than he ever had before by substantial percentages. Cf. Union v. NLRB, F.2d, 74 LRRM 2851 (C.A. D.C. 23342, July 29, 1970.)

4. The defendant in 1964 induced and encouraged in-

dividuals employed by the plaintiff to engage in a strike and a refusal to perform services for Riverton in the course of their employment and also threatened, coerced and restrained Riverton, as those words are used in 8(b)(4)(A) and (B). [UMW v. Osborne, 279 F.2d 716, 46 LRRM 2380, cert. den. 364 U.S. 881, 47 LRRM 2065.] An object, and by far the primary object, of such conduct was to force and require Riverton to enter into the 1964 agreement containing the 80-cent clause and that clause was one of the major additions or changes from the 1958 contract; in other words, the strikeforce coercion threat was directly and primarily related to the 80-cent clause. A proximate result of the 80-cent clause to Riverton was to force it to cease dealing in the products of other producers of coal, i.e., producers who were not unionized. Another proximate result was the forcing of some then non-union producers to unionize and in that sense a proximate result of the clause was bargaining by the Union as the representative of employees it did not represent as a matter of certification. While these were proximate results and foreseeable effects, none of them, nor the collection of them, constituted the primary purpose for exacting the 80-cent clause bargain. That was to prevent subcontracting, preserve Riverton's employees' work, maintain union standards in the production of coal which could just as well have been produced by Riverton and protect the integrity of the Welfare Fund.

In concluding that the 1964 strike was union-authorized, we have applied Coronado as modified by 29 U.S.C. § 185(e) [see Garmeada, 122 F.Supp. 512 (E.D. Ky. 1954) at 517, 34 LRRM 2567] and have applied that subsection, i.e., 29 U.S.C. § 185(e). We have not held the plaintiff to proof of specific authority; in other words, the authorization of the Field Rep. McCoy to represent

the District on the spot included an authorization to call a strike, which he did as effectively as if he had used that language when he gave the signal, "I told them that they did not have one"—meaning a contract. The requirement has been by a preponderance and the plaintiff has shown by a preponderance that the defendant, through its District 17, authorized the 1964 strike. This Court has given no weight in this conclusion or finding to the fact that the Union did nothing to punish or discipline the errant Local in 1964, despite the parent-child relationship. So much of Coronado remains in view of the explanation in Gibbs, supra, "There can be no rigid requirement that a union disavow."

5. As a result of the conduct of the defendant in 1964, the plaintiff terminated its agreement with Ford Coal. It would be speculative to conjecture on whether that contract would have been renewed at the end of its two-year period.

6. With respect to the 1966 strike, there is no evidence in this case based on which this Court could say that the plaintiff has maintained the burden of proving by a preponderance that District 17, or the defendant, either authorized or ratified the 1966 strike at Riverton. At or about that time unauthorized and sporadic strikes were going on all through the Union's jurisdiction, prompted by the failure of the Union and the BCOA to come to some agreement. The situation was entirely different from 1964. There is certainly no connection whatever between the 80-cent clause in either the 1964 or 1966 contract and the 1966 strike. If the 80-cent clause did violate 8(e) and it would be so held in an upper court, there is a nice question of law and fact in this case related to damages and specifically relating to the 1966 contract

—again bearing in mind that this is not a 301 case. The applicable law, of course, is stated in Ritchie v. UMW, 410 F.Supp. 827, 71 LRRM 2267 (6th Cir. 1969) and Teamsters v. Morton, 377 U.S. 252, 56 LRRM 2225 (1964). Only damages which directly and proximately result from an unfair labor practice would be recoverable.

To concentrate for a minute, the problem relates to loss of profits simply and relates to this: Assuming an unfair labor practice resulting in a contractual limitation causes loss of profit to the employer, at what point in time thereafter does the profit loss pass from the proximate and reasonably certain to the speculative. About four years elapsed between April, 1964, and the time the parties by agreement forced the absolute ending period as September, 1968. We have been cited to no authority on this problem; nor do we find any. While it is this Court's conclusion that the four-year period would not be too long and that the plaintiff, if it may recover at all, should recover loss of profit during the entire period; and while it is this Court's conclusion that the making of an interim contract in 1966 did not toll the right or liability, nonetheless, as the foregoing indicates, this Court has made findings of fact in respect of profit loss during what might be called the first period from April of 1964 to 1966 and the second period April, 1966, to September, 1968, separately, so that if there be a reversal on liability, the facts which raise the question for decision will be before a reviewing court.

7. The general rules applicable to damages in this type of case have been so recently stated by the Sixth Circuit in Riverside v. UMW, 410 F.2d 267, 70 LRRM 3214 (1969) and Ritchie v. UMW, 410 F.2d 827, 71 LRRM 2267 (1969) that we need not repeat them in any

detail. First, the plaintiff has the burden of proof by a preponderance; second, only damages proximately resulting from an unfair labor practice may be recovered; third, in the profit area, the plaintiff has the burden of proving loss of profit by evidence showing the loss to be reasonably certain—a fact finder may not engage in speculation or guesswork.

8. Applying those principles to the various items of damage claimed, if the issue of liability should have been determined in favor of the plaintiff and against the defendant, the plaintiiff should recover:

a) The $15,000.00 paid to Ford Coal and the $1,793.46 in fees and expenses related to the settlement, and interest thereon from the dates of payment. The Ford Coal contract breach was the direct result of the 80-cent clause.

b) $13,095.57 for continuing fixed costs and expenses to the plaintiff resulting from the April 10 through April 15, 1964, strike—together with interest from April 15, 1964, since the amount is quite readily determinable.

c) $20,294.97, being the costs and expenses, including attorney's fees, incurred by the plaintiff in connection with the alleged unfair labor practice. This should be without interest—within the difficulty of determination rule.

We are aware that punitive damages are not recoverable in an unfair labor practice case, and we are aware that attorney's fees are generally associated with punitive damages. However, it has been established that at least some costs (initial filing, for instance) are recoverable in a damage action based on an unfair labor practice. That being so, we see no reason to stop there in a situation in which (a) the plaintiff not only had a right of

intervention which resulted in these costs, but (b) as this record establishes, was invited by the governmental authority involved to intervene.

d) This is not a 301 case. Even assuming that Lewis v. Benedict, 259 F.2d 346, 43 LRRM 2237 (6th Cir. 1958) —affirmed by a divided court, 361 U.S. 459, 45 LRRM 2719, read in connection with Union v. Lucas Flour, 369 U.S. 95, 49 LRRM 2717 (1962), would dictate the conclusion that the 1964 Agreement of these parties was the equivalent of a "no strike" clause, nonetheless, the 1966 strike was neither authorized nor ratified by the defendant. The Union members who struck were not per se Union agents. The plaintiff must prove more than merely show, as it did, that all the members of the local struck. The plaintiff did prove the amount of damage resulting to it from the 1966 strike, to-wit, $36,128.50.

e) The loss of profit proximately resulting from the 80-cent clause for the first period shown by the evidence which the plaintiff certainly did suffer was $28,800.00, during the second period it was $35,200.00. Neither of these would bear interest under familiar rules.

Conclusion

This is not a judgment. During the ten-day period after the filing of these Findings and Conclusions the parties are invited to call the attention of this Court to any obvious errors of a mathematical (exceeding 5%) or copying, or mechanical nature. At any time after the ten-day period the parties may present a judgment based hereon which will, of course, be a judgment dismissing the complaint at plaintiff's costs.

Filed October 26, 1970

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RIVERTON COAL COMPANY, a
West Virginia corporation,
and DAVISON FUEL AND DOCK
COMPANY, an Ohio corporation,
Plaintiffs,

v. Civil Action No. 5805

UNITED MINE WORKERS OF AMERICA,
Defendant.

and

RIVERTON COAL COMPANY, a
West Virginia corporation,
and DAVISON FUEL AND DOCK
COMPANY, an Ohio corporation,
Plaintiffs,

v. Civil Action No. 6730

UNITED MINE WORKERS OF AMERICA,
Defendants.

Final Judgment

The above-entitled actions came on to be heard by the Court, sitting without a jury, and the Court, having considered of the evidence and the briefs and arguments of counsel and, for the reasons stated in its Findings of Fact and Conclusions of Law heretofore filed on October 8, 1970 and amended on October 26, 1970 and made a part of the record herein, is of the opinion that plantiffs,

Riverton Coal Company and Davison Fuel and Do
Company, and each of them, have failed to establi
their alleged causes of action against the United Mi
Workers of America and its District 17 under Secti
303 of the Labor Management Relations Act, 1947,
amended [called "Act"] (29 USCA 187), and Secti
8(b)(4)(i)(ii)(A) and (B) [29 USCA 158(b)(4)(
(ii)(A)(B)] and Section 8(e) [29 USCA 158(e)],
of said Act.

It is accordingly

ORDERED, ADJUDGED and DECREED that t
causes of action alleged and asserted in each of sa
causes of action by Riverton Coal Company and Davis
Fuel and Dock Company, and each of them, against t
United Mine Workers of America and its District 17 und
Section 303 of said Act (29 USCA 187), and Secti
8(b)(4)(i)(ii)(A) and (B) [29 USCA 158(b)(4)(i)(
(A) and (B)] and Section 8(e) [29 USCA 158(e)],
of said Act by plaintiffs herein, and each of them, agai
United Mine Workers of America and its District 17
and hereby are dismissed with prejudice, and plainti
and each of them, shall take nothing by their respect
actions.

It is further ORDERED, ADJUDGED and DECRE
that the costs of said actions shall be, and are, tax
against plaintiffs, and each of them, and in favor
defendant United Mine Workers of America.

Enter this 26th day of October, 1970.

s/ TIMOTHY S. HOGAN
District Judge

Have seen:

s/ J. MACK SWIGERT
Attorney for Plaintiffs

s/ ROBERT I. DOGGETT
Attorney for Defendant

APPENDIX B

Decided and Filed January 21, 1972.

Nos. 71-1021 & 71-1022

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RIVERTON COAL COMPANY and DAVISON FUEL AND DOCK COMPANY, *Plaintiffs-Appellants and Plaintiffs-Appellees,* v. UNITED MINE WORKERS OF AMERICA, *Defendant-Appellee and Defendant-Appellant.*	APPEAL from United States District Court for the Southern District of Ohio, Western Division.

Before PHILLIPS, Chief Judge, and WEICK and CELEBREZZE, Circuit Judges.

WEICK, Circuit Judge. Riverton Coal Company (Riverton) and Davison Fuel and Dock Company (Davison) have appealed from a judgment of the District Court dismissing their joint action against United Mine Workers of America (UMW) for recovery of damages under Section 303 of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 187), because of violations of Section 8(b)(4) and Section 8(e) of the Act.

The case was tried to the Court without a jury. Findings of fact and conclusions of law were adopted, in which the Court held that UMW had not violated the Act, and dismissed the complaint. Because of the difficult nature of the case and the closeness of the questions involved, the Court made findings of fact as to damages against UMW in the amount of $150,312.50, plus interest,

for use of the Appellate Court so that the case could be finally disposed of on appeal without remand for retrial on the issue of damages, in the event the judgment was reversed on the issue of liability.

UMW filed a cross-appeal complaining of errors in the findings of fact and conclusions of law adopted by the District Court.

Both Riverton and Davison are corporations; the former is organized under the laws of West Virginia, and the latter under Ohio laws. Riverton was engaged in the business of coal mining and loading river barges on the Kanawha River at Crown Hill and Marmet, West Virginia. Davison had offices at North Bend, Ohio, and was engaged in the business of selling coal. Davison was exclusive sales agent for all of Riverton's mined and purchased coal, receiving a commission ranging from six to eight per cent of the selling price. Riverton was a wholly owned subsidiary of Davison, which kept Riverton's books and records. The capital stock of Davison was closely held and a majority of the stock was owned by the Davison family.

Riverton entered into a collective bargaining agreement with UMW, effective December 1, 1958, which was not subject to termination prior to November 30, 1959, but thereafter either party could terminate the agreement upon thirty days' written notice to the other.

UMW is an unincorporated labor organization with headquarters in Washington D.C. and a district office in Charleston, West Virginia. It was the exclusive bargaining representative of Riverton's employees, who worked in the coal mines in West Virginia. The employees belonged to Local 1209 of UMW.

It was customary for Riverton to purchase coal to supplement its production to fill orders and to meet market requirements. It operated its own mines to full capacity but could not mine enough coal to meet all of its sales requirements because of limited financial resources and lack of necessary mining equipment.

In 1962-63 Davison sold 2,170,000 tons of coal, of which 44½% was coal which had been purchased by Riverton and Davison from other coal mine operators, some of whom were signatory to UMW agreements and others of whom were not. The base price of coal purchased was the same from all operators, namely, four dollars per ton. Also, the quality of the coal was the same. During nine months prior to April, 1964, 78% of the coal purchased by Riverton was purchased from nonsignatory mines, and 22% was purchased from signatory mines.

Some of the suppliers of coal operated on lands in which Riverton and Davison had no interest; others operated on lands owned by Davison and leased to them by Riverton.

The District Court found that in the fall of 1963 UMW, through District 17, called to plaintiffs' attention "the fact that it was doing business with nonunion operators operating under leases from plaintiff on lands controlled by plaintiff and the purpose was to secure plaintiff's 'help' in organizing these operators in exchange for a Union 'consent' to a business enterprise plaintiff was interested in." Riverton officials did not commit themselves.

In November, 1963, District 17 again contacted Riverton to ascertain what it was doing to force nonsignatory operators to become signatories to a UMW contract.

Riverton asked for a list of such operators, which was supplied. It was not claimed that the employees of the nonsignatory operators desired UMW to act as their bargaining representative. Riverton did nothing to induce any of the nonsignatory operators to become signatories.

I

THE 1964 STRIKE

The District Court found that while the 1958 Collective Bargaining Agreement was in full force and effect, UMW, in violation of the terms and provisions thereof, authorized a work stoppage at Riverton's mines commencing on April 10, 1964, which continued until the evening of April 15, 1964. The strike was also a violation of Section 8(d) of the Act.

The Court found that an object of the April 1964 strike was to force or require Riverton to enter into the proposed 1964-form of printed amendment to the National Bituminous Coal Wage Agreement of 1950. The Court further found:

> "Another object of the said strike was to force or require Riverton and Davison to cease using, selling, handling, transporting or otherwise dealing in the products of coal producers who were not signatories to an agreement with the defendant Union and to cease doing business with such producers. Another effect of the said strike was to encourage coal producers selling coal to Riverton or Davison to recognize or bargain with the defendant Union as the representative of the employees of such producers even though the defendant Union had not been certified as the representative of such employees under the provisions of Section 9 of the Act. After Riverton signed the 80-cent clause, and as a result

thereof, some fifteen nonunion producers from which Riverton had been buying supplemental coal became signatories to the UMW agreement. Some twenty-two did not—so the effect was not to 'force' or 'compel' but to encourage."

In order to settle the strike and resume operation of its mines, Riverton was forced to sign the National Bituminous Coal Wage Agreement of 1950, as amended, effective April 2, 1964, which it did under protest on April 15, 1964, and UMW then withdrew its pickets and permitted the mines to resume operations.

The 1964 amendment contained the so-called "80-cent penalty clause" and the "coal lands clause", which Riverton objected to as being illegal.[1] The Protective Wage Clause was dropped from the agreement in that year. Prior to the 1964 Amendment signatories were required to pay into the Welfare Fund forty cents per ton of coal

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[1]The pertinent provisions of the so-called "80-cent penalty clause" are as follows:

"United Mine Workers of America Welfare and Retirement Fund of 1950

". . . During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal produced or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition."

In relevant part, the "coal lands clause" read:

"Application of Contract to Coal Lands

"As part of the consideration for this agreement, the Operators signatory hereto agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its terms which may hereafter (during the term of this Agreement) be put into production or use . . . ."

produced by them. The purpose of the amendment was to require signatories who procured or purchased from non-signatories soft coal for sale or use, to pay into the Welfare Fund eighty cents per ton of coal so purchased or procured.

In *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 at 781 (6th Cir. 1970), we said:

> "While the stated purpose of the amendment was to protect work standards by equalizing labor costs between employees of signatories and nonsignatories, the obvious effect was to discourage signatories from purchasing or acting as sale agents for coal companies which produced coal with non-UMW laborers."

The District Court stated that the eighty cent penalty clause and the "coal lands" clause were the "legal" substitutes for the PWC clause in the 1958 agreement after PWC had been held by the National Labor Relations Board to violate Section 8(e) of the Act. *Raymond O. Lewis, et al.*, 144 NLRB 228 (1963).[2]

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[2]The ill-fated PWC (Protective Wage Clause) was litigated extensively in this Circuit. Referring to this clause in *Tennessee Consol. Coal Co.* v. *UMW*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), we said:

> "The record contains an admission by counsel for UMW that the PWC was a 'quid pro quo.' Paragraph A was demanded by BCOA. Paragraph B, containing the promise of the signatory operators, was demanded by UMW. In this paragraph the operators agreed to boycott coal not produced in conformity with the national agreement. UMW faithfully complied with Paragraph A in all collective bargaining agreements which it entered into. UMW struck operators who refused to agree to the national contract. The record in *Ramsey* is replete with evidence of mass picketing, force and violence." (*Id.*, at 1198).

See also opinion of Circuit Judge O'Sullivan in *Ramsey* v. *UMW*, 416 F.2d 655 at 667 et seq. (6th Cir. 1969 en banc), and cases therein cited which affirmed the judgment of the District Court, by an equally divided court. The Supreme Court reversed the judgment of this court, which reversal was in accord with the views expressed in Judge O'Sullivan's opinion. *Ramsey* v. *UMW*, 401 U.S. 302 (1971).

See also *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970).

It was the opinion of the District Court that the primary purposes of the eighty cent penalty and the coal land clauses were to protect work opportunities and wages of UMW members and to maintain the integrity of the UMW Welfare and Retirement Fund. Much evidence was offered by UMW on the history of its bargaining and the plight of its members due to competition with other fuels, with a substantial loss of business.

Notwithstanding this, the District Court specifically found that "an object" of the 1964 strike was to force Riverton to sign the agreement containing the eighty cent penalty clause. Another object was to compel Riverton and Davison to cease doing business with, and to cease using the products of, other coal producers who were nonsignatories. The foreseeable purpose of the eighty cent clause was "the unionization of some non-union employers."

It is clear that Section 8(b)(4) of the Act forbids strike action if "an object" is to force an employer to do any of the things prohibited by Section 8(e). The statute does not mention primary object or purpose. If any object of the strike is forbidden by Section 8(b)(4), it is a secondary boycott. It is not necessary to find that it was the sole object. *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951).

Granting that UMW at all times desired to protect and preserve the work opportunities of its members and their pension fund, which is certainly a worthy motive, this intention does not give UMW a license to violate other laws which violation the District Court found was an object of the strike. *UMW* v. *Pennington*, 381 U.S. 657, 665 (1965).

The mandatory provisions of Section 8(b)(4) are just as binding on a labor union as is the Sherman Act. *NLRB* v. *Denver Bldg. & Const. Trades Council, supra.*

UMW argues that subcontracting is a bargainable issue, citing *Fibreboard Paper Prods. Corp.* v. *NLRB,* 379 U.S. 203 (1964). This case is inapposite for it involved the contracting out of maintenance work which was previously performed by the company's employees and such contracting out would have adversely affected them by reason of discharges and layoffs.

In our case, the supplemental coal which Riverton and Davison were purchasing from signatory and nonsignatory suppliers involved work which was never performed by their own employees. Riverton was operating at all times at full capacity, but because of lack of working capital and of mining equipment, it could not run additional mines, and it was necessary for Riverton to purchase coal to fill its orders.

The eighty cent penalty clause was not directed at job security, because Riverton could comply therewith by closing its mines, discharging all of its employees, and filling its entire requirements with coal from other signatory mines. Furthermore, Riverton could purchase coal from a signatory mine supplier whose employees were operating under substandard wages and working conditions.

The trouble is that the clauses in question here were not "addressed to the labor relations of the contracting employer [Riverton] vis-a-vis his own employees", but on the contrary, to the boycotted employers (nonsignatory suppliers), *National Woodwork Mfrs. Ass'n.* v. *NLRB,* 386 U.S. 612 (1967).

UMW further contends that multi-employer collective bargaining is permissible. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957). But as was observed in *UMW* v. *Pennington, supra*, there are "limits to what a union or an employer may offer or extract in the name of wages and because they must bargain does not mean that the agreement reached may disregard other laws." *Id.* at 665.

It should be pointed out that while the 1958 agreement which contained the PWC was negotiated for Riverton by Southern Coal Producers Association (SCPA), Riverton did not permit SCPA to do any negotiating for it thereafter with respect to either the 1964 or 1966 contracts, concerning which it dealt directly with UMW.

The 1964 strike was a violation of the 1958 contract which the District Court held contained a "no strike" clause, relying on *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346 (6th Cir. 1958), *affirmed by an equally divided court*, 361 U.S. 459 (1960).

UMW argues that the findings of fact of the District Court that UMW authorized or ratified the 1964 strike, are not supported by substantial evidence and are clearly erroneous. We disagree.

The District Court detailed the evidence to support its findings, which included the conduct of Field Representative Emery McCoy and other UMW agents who, although they knew that the 1958 contract was still in full force and effect, led Riverton employees to believe that they did not have a contract. As these agents well knew, UMW members had a tradition of "no contract, no work." To tell them that they had no contract was the "signal" for them to strike. The strike was settled only when Riverton signed under protest the new agreement con-

taining the eighty cent penalty clause. Thus UMW also ratified the strike. The testimony to the contrary of UMW agents was not credited by the District Court. The testimony of the McCoy's was characterized by the Court as "less than candid."

UMW relies on a decision of the National Labor Relations Board in *International Union, UMW, et al.*, 188 NLRB 121 (1971), where the Board by a 3 to 2 vote upheld the eighty-cent clause.

It should be pointed out that the Board has not been consistent in its rulings on either the eighty-cent or the PWC clause. The Board first held that PWC was illegal. *Raymond O. Lewis*, 144 NLRB 228 (1963). The following year, in a supplemental decision it held the eighty-cent clause illegal. *Raymond O. Lewis, et al.*, 148 NLRB 249 (1964).

The District of Columbia Court of Appeals remanded PWC to the Board for further proceedings. *Lewis* v. *NLRB*, 350 F.2d 801 (D.C. Cir. 1965). On remand, the Board reversed itself with Chairman Brown dissenting, and found PWC legal. *W. A. Boyle, et al.*, 179 NLRB 80 (1969). Following the remand ordered in 399 F.2d 977 (D.C. Cir. 1968), and contrary to the recommendations of its trial examiner, the Board in its 3 to 2 decision (and after a change in membership) reversed itself and held that the eighty-cent clause was legal. 188 NLRB 121 (1971).

In our view, the Board decisions holding the two clauses to be illegal, appear to be better reasoned decisions. Seven Board members have held the eighty-cent clause invalid. Only three Board members and no trial examiner have held otherwise.

We do not regard the decisions of the Board as controlling on us in damage actions under Section 303. *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237 (1952); *United Brick & Clay Workers* v. *Deena Artware Inc.*, 198 F.2d 637 (6th Cir. 1952), *cert denied*, 344 U.S. 897 (1952), *rehearing denied*, 344 U.S. 919 (1953); *NLRB* v. *Deena Artware*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953); *Old Dutch Farms Inc.* v. *Milk Drivers*, 281 F.Supp. 971 (E.D. N.Y. 1968).

II

THE 1966 STRIKE

This strike, like the one in 1964, was also illegal. It violated the provisions of the 1964 "no strike" contract. It violated Section 8(d) of the Act. When the 1966 strike was conducted, the 1964 agreement was in full force and effect. It had not been terminated by either party.

The only way Riverton could terminate the strike was to sign the 1966 amendment to the national contract, which it did under protest. Upon signing it, the strike ended. UMW was successful.

The 1966 contract also contained the illegal eighty-cent penalty clause.

UMW did nothing to persuade its members to return to work other than to send them a telegram. It did not even tell them that they had a valid contract which was being violated by their work stoppage. It did not undertake to discipline the strikers. Its inaction was a form of influence and persuasion. On the other hand, UMW benefited by the strike and took advantage of that fact to get a new contract. *IBEW* v. *NLRB*, 341 U.S. 694 (1951); *Vulcan Material Co.* v. *Steelworkers*, 430 F.2d 446 (5th

Cir. 1970); *UMW* v. *Osborne Mining Co.*, 279 F.2d 716 (6th Cir.), *cert. denied*, 364 U.S. 881 (1960).

Local 1209 was not an autonomous labor organization separate and apart for UMW. It was an administrative arm of UMW and was supervised, dominated and controlled by UMW. Under the UMW constitution, UMW had the right "to reverse the action of the Local Union."

It can well be said that UMW, having the power to correct the unlawful action of the Local union, and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the contract, thereby induced and encouraged both the 1964 and the 1966 strike. *International Bhd. of Teamsters* v. *Humko Co.*, 287 F.2d 231 (6th Cir.), *cert. denied*, 366 U.S. 962 (1961).

The findings of fact by the District Court that UMW did not induce or encourage the 1966 strike, and did not thereby violate the Act, are not supported by evidence and are clearly erroneous.

In our opinion UMW was liable to the plaintiffs for all damages proximately resulting from the violations of the Act by UMW.

III

DAMAGES

Where liability is established, the plaintiffs are entitled to recover all damages directly and proximately resulting from the violations of the Act by UMW. We have considered the issue of damages in previous cases. *Ritchie* v. *UMW*, 410 F.2d 827 (6th Cir. 1969); *Riverside Coal Co.* v. *UMW*, 410 F.2d 267 (6th Cir. 1969) and cases therein cited; *UMW* v. *Osborne Mining Co.*, 279 F.2d 716

(6th Cir.), *cert. denied*, 364 U.S. 881 (1960). The District Court had the benefit of these decisions.

The plaintiffs asserted claims for damages in the amount of $2,587,315, but they were rejected by the Court except to the extent that the Court allowed them in the amount of $150,312.50, plus interest.

The plaintiffs contend that the damages proposed to be awarded are grossly inadequate. UMW contends that the proposed award is excessive and is not supported by substantial evidence.

In his findings of fact the District Court stated:

> "61. The plaintiff's profit-loss damage claims, totalling $2,587,315.00 are rejected except to the extent dealt with above. The claims are based on plaintiff's exhibits 52 and 53 and the testimony relative thereto. The claim broadly amounts to an assertion that an operation which in the sole preconstraint year (1963) in evidence made $95,000.00 (before taxes etc.) would have made a profit (before taxes etc.) of in excess of $500,000.00 a year over the approximate 4½ years of constraint. This was not a new company—it was long existent. We have mentioned some assumptions leading to the assertion—one more should be mentioned: The plaintiff's loss of profit claim is based on, among other assumptions, the assumption that over 2,000,000 tons of coal, involving dozens of entities and some eleven millions of dollars could and would have involved no increase in administrative expense. That is simply too speculative."

The Court found that plaintiffs had shown that during the period from April, 1962 through 1968, Riverton was unable to fill orders on hand amounting to about 800,000 tons, of which 360,000 tons are applicable to the period April 1, 1964 to April 1, 1966, and the balance of 440,000

tons is applicable to the period April 1, 1966 to September 30, 1968.

The Court then figured that the operating profit (before taxes and nonoperating expenses) was eight cents per ton, basing it on the integrated Davison and subsidiaries' operation for 1963, which was the closest period before the restraint, and it was the only year for which an operating statement was in evidence.

It was the theory of plaintiffs that they were entitled to recover the selling price of the supplemental coal less the actual cost and a sales commission. The Court was of the view that the purchase and sale of 800,000 tons of coal over a period of four and one-half years would entail administrative expense. We do not regard this finding as unreasonable. If plaintiffs contend that the Court should have considered years other than 1963, they should have furnished operating statements in support of their contention.

The Court allowed $15,000 for settlement of the breach of contract action instituted by Ford Coal Co., (which contract Davison was unable to fulfill because of its inability to acquire the coal) and for attorneys' fees and expenses. The Court was of the view that the settlement of an $850,000 lawsuit for $15,000 was a good settlement.

The Court further allowed damages for unavoidable fixed costs and expenses during the 1964 and 1966 strikes.

Other claims were made by plaintiffs which the Court rejected as speculative.

We do not say that a much larger award could not be sustained. We do hold that the award was within the range of the evidence and we are not inclined to disturb

it. This was a difficult case to try, and the District Judge handled it well.

In our opinion, Riverton and its parent corporation Davison are proper parties to bring the action.

The claim of UMW that the award is excessive is clearly without merit.

The judgment of the District Court will be reversed and the cause remanded to the District Court for entry of a judgment in favor of plaintiffs in the amount of $150,312.50, plus interest.

Filed January 21, 1972

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1021

RIVERTON COAL COMPANY AND
DAVISON FUEL AND DOCK COMPANY,
Plaintiffs-Appellants,

VS.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

BEFORE: PHILLIPS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for entry of a judgment in favor of plaintiffs in the amount of $150,312.50, plus interest.

It is further ordered that Plaintiffs recover from Defendant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk.

Filed January 21, 1972

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1022

RIVERTON COAL COMPANY AND
DAVISON FUEL AND DOCK COMPANY,
Plaintiffs-Appellants and
Plaintiffs-Appellees,

VS.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee and
Defendant-Appellants

BEFORE: PHILLIPS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for entry of a judgment in favor of plaintiffs in the amount of $150,312.50, plus interest.

It is further ordered that Plaintiffs recover from Defendant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk.

APPENDIX C

Labor Management Relations Act, 1947, as Amended:

29 USCA 152(13) [Section 2(13) of the Act]:

When used in this subchapter—

* * * *

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. July 5, 1935, c. 372, § 2, 49 Stat. 450; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 137.

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29 USCA 158(b) (4) [Section 8(b) (4) of the Act]:

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

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29 USCA 158(d) [Section 8(d) of the Act]:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect

to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until

the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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29 USCA 158(e) [Section 8(e) of the Act]:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforc-

ible and void . . . July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

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29 USCA 185(e) [Section 301(e) of the Act]:

Suits by and against labor organizations—Venue, amount, and citizenship

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

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29 USCA 187 (Section 303 of the Act):

Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount

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[1] So in original. Probably should read "of".

in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, c. 120, Title III, §303, 61 Stat. 158; Sept. 14, 1959, Pub. L. 86-257, Title VII, §704(e), 73 Stat. 545.

APPENDIX D

73 Harvard Law Review 1086, 1119:

Aaron, "The Labor-Management Reporting and Disclosure Act of 1959", writing on Section 8(e):

> "As long as the union can show that the subcontracting provision will directly benefit employees covered thereby, *its other motives, as well as the incidental effects of such an arrangement on outsiders, should not be made the basis for declaring the agreement illegal.*"

62 Michigan Law Review 1176, 1187 (May, 1964):

David M. Ebel, "Subcontracting Clauses and Section 8(e) of the National Labor Relations Act":

> "This incidental secondary objective, however, is quite different from the tainted secondary pressure embodied in a hot-cargo clause whereby a union deliberately uses one employer as a battering ram to break down another employer's resistance to certain union demands. It possesses neither the tendency to enlarge outside labor disputes nor the capacity to involve neutral employers in foreign altercations. *Therefore, the inevitable presence of such an incidental objective should not be sufficient to condemn the subcontracting clause.*"